

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

704

APPENDIX

372

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,400

THE TIDEWATER BROADCASTING COMPANY, INCORPORATED

Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION

Appellee

APPEAL FROM A DECISION OF THE
FEDERAL COMMUNICATIONS COMMISSION

APPENDIX

United States Court of Appeals
for the District of Columbia Circuit

FILED MAR 17 1969

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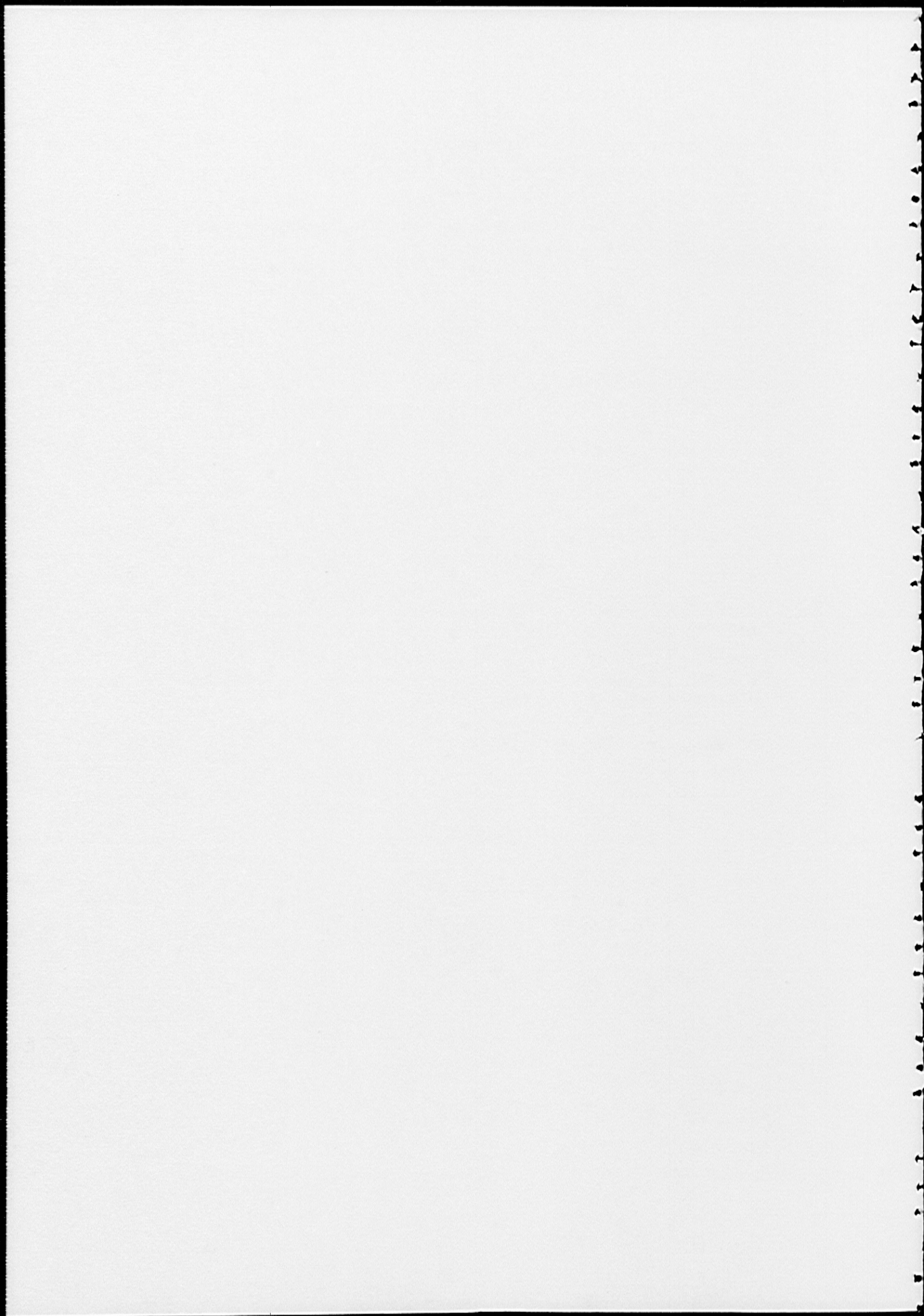
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Before the
FEDERAL COMMUNICATIONS COMMISSION FCC 61D-102
Washington, D. C. 7269

In re Applications of

THE TIDEWATER BROADCASTING COMPANY,
INCORPORATED
Smithfield, Virginia

EDWIN R. FISCHER
Newport News, Virginia

For Construction Permits

DOCKET NO. 13243
File No. BP-12814

DOCKET NO. 13248
File No. BP-13114

Appearances

Robert M. Booth, Jr. and John L. Tierney, on behalf of The Tidewater Broadcasting Company, Incorporated; William P. Bernton and E. Theodore Mallyck, on behalf of Edwin R. Fischer; William A. Porter and Edwin R. Schneider, on behalf of Radio Virginia, Incorporated (WXGI), respondent; and Thomas B. Fitzpatrick, James F. Marten, Kenneth A. Finch, Robert B. Jacobi and Robert J. Rawson, on behalf of the Broadcast Bureau.

INITIAL DECISION OF HEARING EXAMINER ELIZABETH C. SMITH

Preliminary Statement

1. The above-entitled applications of The Tidewater Broadcasting Company and Edwin R. Fischer propose to establish new standard broadcast stations at Smithfield and Newport News, Virginia, respectively, each to operate as a Class II station on the frequency of 940 kc, with a power of 10 kw, daytime only.

2. The Commission, by order released October 28, 1959, designated for consolidated hearing some 30 applications ^{1/} for new or modified standard broadcast stations in Illinois, Indiana, Michigan, Ohio, Kentucky, Tennessee, Mississippi, North Carolina, Virginia, Maryland and Pennsylvania, to operate on 940 kc, or immediately adjacent channels. Amendments, dismissals, and grants without hearing pursuant to petitions for reconsideration, of a number of applications made possible the severance of various applications into separate proceedings.

^{1/} Seventeen respondents were also named. Only one of such respondents related to the above-styled applicants, namely, Radio Virginia, Incorporated, licensee of Station WXGI, Richmond, Virginia, which was named respondent in connection with both proposals.

3. At the first prehearing conference held in the over-all proceeding, on December 11, 1959, the applications were broken down into three hearing groups. Thirteen applications, including the above-styled applicants, comprised Group 3. Subsequently, one of these was removed from hearing by the Commission and granted, ^{2/} and three were dismissed. ^{3/} By order dated July 27, 1960, the Commission severed from the over-all proceeding the remaining nine applications in Group 3, including the above-styled applications. Thereafter, two more applications were removed from hearing and granted by the Commission; ^{4/} and two more applications were dismissed. ^{5/} By order dated March 9, 1961, ^{6/} the remaining five applications in Group 3, which had by that time become three separate proceedings so far as their relationships with other applications are concerned, were severed into three proceedings, of which the above-styled applications comprise one.

4. In the original order of designation, the Commission found that, except as indicated by the issues specified below, The Tidewater Broadcasting Company and Edwin R. Fischer are both legally, technically, financially and otherwise qualified to construct and operate their respective proposals. The issues which are now pertinent to The Tidewater Broadcasting Company and Edwin R. Fischer, in whole or in part, are as follows:

- (1) To determine the areas and populations which would receive new primary service from each of the instant proposals for a broadcast station, and the availability of other primary service to such areas and populations.

2/ Cape Fear Broadcasting Company (WFNC), Docket 13236.

3/ East Virginia Broadcasting Company, Docket 13234; Radio Associates, Inc., Docket 13238; and Greater District Broadcasting Company, Docket 13244.

4/ Radio Virginia, Incorporated (WXGI), Docket 13229 and Radio Americana, Inc., Docket 13245.

5/ Rossmoyne Corporation, Docket 13247 and Catonsville Broadcasting Company, Docket 13250.

6/ A petition for severance was filed by Tidewater Broadcasting Company on January 23, 1961, requesting that the mutually exclusive applications of Tidewater and Edwin R. Fischer be severed from the other applications. At a conference held on March 9, 1961, an oral motion was made to sever (1) WPET, Inc., and (2) Seven Locks Broadcasting Company and Tenth District Broadcasting Company into two other separate proceedings. Such petition and oral motion were unopposed and were granted by order dated March 9, 1961.

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(3) To determine the nature and extent of the interference, if any, that each of the instant proposals would cause to and receive from each other and all other existing standard broadcast stations, the areas and populations affected thereby, and the availability of other primary service to the areas and populations involved in the interference between the proposals.

(4) To determine whether the interference received from any of the other proposals herein and any existing stations would affect more than ten percent of the population within the normally protected primary service area of any one of the instant proposals in contravention of Section 3.23(c)(3) of the Commission Rules and, if so, whether circumstances exist which would warrant a waiver of said Section.

(5) To determine whether the following proposals would involve objectionable interference with the operations indicated below, or any other existing standard broadcast stations, and, if so, the nature and extent thereof, the areas and populations affected thereby, and the availability of other primary service to such areas and populations:

Proposal

Existing Station

BP-12814

WXGI, Richmond, Virginia ^{7/}

BP-13114

"

"

"

(14) To determine, in the light of Section 307(b) of the Communications Act of 1934, as amended, which of the instant proposals would best provide a fair, efficient and equitable distribution of radio service.

(20) To determine, in the event Newport News, Virginia, or Smithfield, Virginia, is preferred under Issue 14, whether Edwin R. Fischer and Tidewater Broadcasting Company will provide service to the community selected as having the greater need for a new facility.

(21) To determine, if Edwin R. Fischer and Tidewater Broadcasting Company would provide service to the community determined to have the greater need for a new facility, which of the proposals of these two applicants would better serve the public interest in the light of evidence adduced

^{7/} This related to the then existing operation of Station WXGI. Subsequently, the application of WXGI, formerly both an applicant and a respondent in this proceeding, was removed from hearing and granted, subject to the condition that it accept the interference which might result from a grant of either of these applications.

pursuant to the foregoing issues and the record made with respect to significant differences between the applicants as to:

- (a) The background and experience of each having a bearing on the applicant's ability to own and operate its proposed station.
- (b) The proposal of each of the applicants with respect to the management and operation of the proposed station.
- (c) The programming service proposed in each of the said applications.

(23) To determine, in the light of the evidence adduced pursuant to the foregoing issues, which, if any, of the instant applications should be granted.

5. As already indicated, the application of Radio Virginia, Inc. (WXGI), Docket 13229, was removed from hearing and granted by the Commission by Memorandum Opinion and Order dated September 7, 1960. Likewise, the application of Radio Americana, Inc., Docket 13245, was removed from hearing and granted by the Commission by Memorandum Opinion and Order dated January 4, 1961. Such grants were made subject to the condition that the permittees accept any objectionable interference which may be caused to the proposed operations as a result of the grant of, inter alia, the application of The Tidewater Broadcasting Company, Incorporated, or that of Edwin R. Fischer here under consideration.

6. In addition to the first prehearing conference held in the original over-all proceeding in December 1959, the above-styled applicants were parties to other prehearing conferences held on April 29, June 7 and 14 and September 12, 1960, and hearing sessions for Group 3 were held on May 26, July 18-22, 25-27, September 12, 21-23 and 27-30, October 3, 7 and 12, 1960, and the record was closed on November 28, 1960. By order dated March 9, 1961, the record was reopened for the limited purpose of receiving in evidence an exhibit of Seven Locks Broadcasting Company. The record was again closed on the same date. Proposed findings of fact and conclusions of law were filed by the applicants and by the Broadcast Bureau ^{8/} on or before February 8, 1961, and reply findings were filed by the applicants on March 17, 1961.

FINDINGS OF FACT

7. Tidewater Broadcasting proposes to operate in Smithfield and Fischer in Newport News and the simultaneous operation of the two proposals would result in mutually prohibitive interference.

8. Neither Smithfield nor Isle of Wight County in which it is located has a radio station located therein. Newport News is a part of the Newport News-Hampton Standard Metropolitan Statistical Area, which has three radio stations: two in Newport News (WYOU - now WTID - 1270 kc, 1 kw, daytime and WGH, 1310 kc, 5 kw, unlimited) and one in Hampton (WVEC, 1490 kc, 250 watts, unlimited).

^{8/} The Broadcast Bureau proposed findings did not include either findings or conclusions with respect to the comparative issue.

Areas Involved

9. The coastal area of central Virginia is divided into a number of land areas by the Lower Chesapeake Bay and the York, James, Elizabeth and Nansemond Rivers, which flow into the harbor of Hampton Roads. Transportation between the areas is over toll bridges, through toll tunnels, or by toll ferries. The peninsula north of the outlet to the Atlantic Ocean and between the ocean and Chesapeake Bay, consisting of Accomack and Northampton Counties, is known as the Eastern Shore and is not here relevant. South of Hampton Roads and the outlet to the ocean are the cities of Norfolk, Portsmouth and Virginia Beach, the counties of Norfolk and Princess Anne, which constitute the Norfolk-Portsmouth Standard Metropolitan Statistical Area. Neither of the applicants proposes a station in such area. The peninsula northwest of Hampton Roads and between the York and James Rivers, including the cities of Newport News, Hampton and Williamsburg and the counties of York and James City, and the Newport News-Hampton Standard Metropolitan Statistical Area, is referred to as the "Virginia Peninsula". According to the 1960 U. S. Census, the Newport News-Hampton Standard Metropolitan Statistical Area is comprised of the cities of Newport News and Hampton and York County. ^{9/} Fischer's proposal has Newport News for its site. Across the James River to the west of the Newport News-Hampton Standard Metropolitan Statistical Area lies the county of Isle of Wight, of which Smithfield is the principal city. The Tidewater proposal has Smithfield for its site. Four other counties of Virginia (Surry, Sussex, Nansemond and Southampton) are situated contiguous to Isle of Wight County and, according to the evidence in this record, have the same general economic background based on agricultural and forestry pursuits and some light industry. ^{10/} The evidence shows that the southeastern part of Virginia, in which both Newport News and Smithfield are located, has factors which are common to the entire area and other factors which are not. It is clear that the two municipalities are not only separated by the James River and located in different counties but they are not located in the same metropolitan

^{9/} Official notice has been taken of the 1960 U. S. Census Reports with respect to the areas involved in this proceeding.

^{10/} The only broadcast stations in such 5-county Virginia area are Station WLFM, Suffolk, 1460 kc, 1 kw-LS, 500 watts, DA-N, unlimited, 19 miles from Smithfield; and Station WISR, Franklin, 1250 kc, 1 kw, daytime only, 26 miles southwest of Smithfield.

area, as defined by the Bureau of the Budget ^{11/} and used by the Census Bureau in the 1960 U. S. Census. Likewise, Smithfield is not a part of the Newport News-Hampton Urbanized Area.

10. It has long been recognized by the U. S. Census Bureau "that for many types of social and economic analysis it is necessary to consider as a unit the entire population in and around the city whose activities form an integrated social and economic system". ^{12/} As hereinbefore indicated, in determining the economic and social relationships of areas, the Bureau of the Budget used data as to population density, labor force, occupation, employment by place of work, volume of commuting, volume of telephone communication, newspaper circulation, charge accounts, delivery service practices, traffic volume, and public transportation.

^{11/} According to a publication, "Standard Metropolitan Statistical Areas", by the Executive Office of The President, Bureau of the Budget, 1961, pages 1, 3:

"The general concept of a metropolitan area is one of an integrated economic and social unit with a recognized large population nucleus.

"The definition of an individual standard metropolitan statistical area involves two considerations: first, a city or cities of specified population to constitute the central city and to identify the county in which it is located as the central county; and, second, economic and social relationships with contiguous counties which are metropolitan in character, so that the periphery of the specific metropolitan area may be determined."

It is also pointed out at page 4 of such publication that "The criteria of integration relate primarily to the extent of economic and social communication" between areas. The residence of workers is one criterion and where such data is not conclusive, information relating to such items as telephone calls per month from the county to the county containing central cities of the area; percent of the population located in the central city telephone exchange area; newspaper circulation reports prepared by the Audit Bureau of Circulation; analysis of charge accounts in retail stores of central cities to determine the extent of their use by residents of the contiguous counties; delivery service practices of retail stores in central cities; official traffic counts; the extent of public transportation facilities; and the extent to which local planning groups and other civic organizations operate jointly.

^{12/} U. S. Census of Population - Virginia - U. S. Department of Commerce, Bureau of the Census, p. VII.

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10-a. Newport News and Smithfield are in different areas for promotional and development purposes. The Virginia Peninsula, which, as already indicated, includes Newport News but does not include Smithfield, has a number of such Peninsula-wide organizations and undertakings, including Peninsula Port and Industrial Authority, Peninsula Airport Commission, Peninsula Industrial Committee, Peninsula Chamber of Commerce, and Peninsula Welfare Planning Council. On the other hand, the Tidewater Virginia Development Council, which is an organization devoted to the development of the Tidewater area, does not include within its scope of activities the area described as the Virginia Peninsula. One unit of operation of the Development Council includes the town of Smithfield and Isle of Wight County, as well as Southampton County with its towns of Franklin, Boykins and Branchville, Nansemond County with the city of Suffolk, and the town of Wakefield in Surry County. This last-mentioned area has an industrial complex in a minor sense, but with heavy emphasis upon agriculture; whereas, the Virginia Peninsula is devoted to industrial and military base activities.

Tidewater Broadcasting

11. Smithfield, the largest urban center in Isle of Wight County, Virginia, is not a part of any metropolitan or urbanized area. The town is well known for being the home of the Smithfield Ham. Isle of Wight County, with a 1960 population of 17,164 persons and a land area of 321 square miles, has 29 manufacturing establishments with a value added by manufacturing of more than \$24,000,000 a year in 1958; 127,000 acres of commercial forests; retail sales of \$11,161,000 in 1958; and effective buying income of \$19,287,000 in 1958. The town of Smithfield is the primary trading area of Isle of Wight County, which is near the geographical center of the 5-county area, and is also one of the service centers of the 5-county area. Although the population within the corporate limits of Smithfield at the time of the 1960 Census was taken was 917, annexation

proceedings were under way at the time of the hearing which would extend the corporate limits to embrace approximately 2,633 persons. ^{13/}

12. Smithfield was incorporated in 1752. It has a mayor-council form of government, its own court system, public works, water system, fire and police departments, clerk, treasurer, town attorney, public park, town hall and community center, and public library. Education, health, welfare and similar services are provided through joint town, county and state programs. Isle of Wight County and the Town of Smithfield are in the same school district. Two of the county's three banks are located in Smithfield. Isle of Wight, Surry and Nansemond Counties are served primarily by a telephone company which has its headquarters in Smithfield. The Isle of Wight County Training School and one of six other county high schools are located in Smithfield. Smithfield and Isle of Wight County have the following functions not connected with any other county: school systems; law enforcement; soil conservation; county agents and home demonstration agents; Red Cross; fire departments; welfare departments; Heart Fund; Polio Fund; Cancer Fund; Boy Scouts-Old Dominion Area Council; Ruritan Club; Rotary Club; Senior and Junior Women's Clubs; Lions Club; and Ministerial Association. The only newspaper published in Isle of Wight County is a weekly published in Smithfield. Other newspapers published in the 5-county area are: one twice-weekly, published in Franklin; one weekly, published in Waverly; and a daily newspaper published in Suffolk. Of the 2,740 daily newspapers circulated in Isle of Wight County on an average, 63.5% are published in Norfolk, 29.2% in Suffolk, and 7.3% in Newport News.

13. Road distances ^{14/} from Smithfield to various cities are as follows: Newport News, 19 miles; Portsmouth, 21 miles; Norfolk, 23 miles; and Suffolk, 19 miles. To go from Smithfield to Newport News, or vice versa, it is necessary to travel over the James River toll bridge. The cash toll for an automobile over the James River highway bridge between Smithfield and Newport News is 90¢ per crossing; there is, however, a commuter rate of 55¢ per crossing when ten tickets are purchased at one time. It is also necessary to travel over a toll bridge to get to Portsmouth and over a toll bridge-tunnel to get to Norfolk, from Smithfield. There is no local public transit system between Smithfield and any one of these cities. However, Trailways Bus System provides one trip a day to Newport News, one trip a day to Suffolk, and six trips a day to Norfolk-Portsmouth.

^{13/} On June 10, 1960, the Circuit Court of Isle of Wight County handed down an oral opinion in favor of the Town of Smithfield in the annexation proceeding and a Memorandum of said opinion was entered by the said Court on June 15, 1960. Under Section 15-152.11 of the Virginia Code, the Court must enter an order in annexation proceedings. The record contains a copy of the memorandum opinion of the Circuit Court; and official notice has been taken of the fact that the annexation order pursuant thereto was entered by the Circuit Court on October 27, effective at midnight December 31, 1960; that a notice of appeal has been filed; that the annexation order was not stayed; and that Smithfield has been providing police, fire and other services to the area in question since January 1, 1961.

^{14/} Airline mileage is of little, if any, significance because of the terrain of the area. Transit between Smithfield and Newport News, Portsmouth and Norfolk entails the crossing of substantial water areas at points on highways via bridges. No air service is shown between the points.

Fischer

14. The city of Newport News is located in the southern part of the "Virginia Peninsula". Newport News, as presently constituted, is the result of the consolidation of Newport News and Warwick. It is now a part of the Newport News-Hampton Standard Metropolitan Statistical Area, as defined by the Bureau of the Budget and used by the Census Bureau. Such Metropolitan Area, according to the 1960 U. S. Census, has a population of 224,503; with Newport News accounting for 113,662 persons, ^{15/} Hampton 89,258, and York County 21,583. The first reorganization of the Newport-News area as a Metropolitan Area was in 1952, when the Bureau of the Budget established Newport News-Warwick-Hampton as a standard metropolitan area. This action followed the reorganization of the city of Hampton whereby the independent city of Hampton and Elizabeth City County were consolidated into the first-class city of Hampton. Thereafter, on July 1, 1958, Newport News and Warwick consolidated into one municipality and adopted the name of Newport News. After the latter consolidation, the Bureau of the Budget changed the name of the metropolitan area to the Newport News-Hampton Standard Metropolitan Statistical Area, which it defines as the cities of Newport News and Hampton and York County. ^{16/}

15. Newport News has a city manager form of government, with a seven-member council. ^{17/} The Newport News City Council elects a school board, city clerk, judges of the lower courts, city attorney, city auditor and members of other boards and commissions. Newport News is a port city located midway on the Eastern Seaboard and is the seaport terminus of the Chesapeake and Ohio Railway Company. Its port facilities include 23 berths where ships can land and discharge cargoes. There are an additional 18 berths where ships may be constructed or repaired by the Newport News Shipbuilding and Dry Dock Company. The leading exports of the port of Newport News are coal, tobacco, chemicals, dairy products, cotton (manufactured and semi-manufactured), wood pulp and automotive vehicles. The main imports to the port are iron ore, manganese and chrome ores, fibre board, and newspapers. ^{18/}

^{15/} According to the U. S. Census Reports, the 1960 population of Newport News is made up of 42,233 persons residing in the 1950 area and 71,429 in the area annexed to it since 1950. The city, as it was constituted in 1950, had a population of 42,358 and, thus, suffered a loss of 125 persons under the 1960 Census. The very substantial increase in population of the city of Newport News is, therefore, due to annexation of territory. (Table 9, 1960 U. S. Census, for the State of Virginia)

^{16/} Although Williamsburg is geographically situated partially in York County and partially in James City County, it is a city independent of both counties. York County has a population, exclusive of that portion of Williamsburg geographically located therein, of 21,583 persons, according to the 1960 U. S. Census. Williamsburg has a 1960 population of 6,832.

^{17/} Hampton also has a city manager form of government and York County has a modified county manager form of government.

^{17-a/} Exports and imports moving through the Port of Newport News during 1957 had a value of 483.2 million dollars and 94.6 million dollars, respectively.

16. Military establishments located in the immediate area include Fort Monroe and Langley Air Force Base at Hampton, Fort Eustis, at Newport News, and three U. S. Navy installations at Yorktown. The National Aeronautics and Space Agency maintains an installation in Hampton adjacent to Langley Air Force Base. Hampton Institute, a Negro college, is located at Hampton. The Apprentice School of the Newport News Shipbuilding and Dry Dock Company, founded in 1919, is accredited as a two-year technical college.

17. Examples of Peninsula-wide undertakings and organizations are the Peninsula Airport Commission which operates the Patrick Henry Airport midway between Newport News and Williamsburg;^{18/} Peninsula Port and Industrial Authority; Peninsula Christian Ministers Association; Peninsula Industrial Committee; Peninsula United Fund; Peninsula Chamber of Commerce; Peninsula Welfare Planning Council; Peninsula Catholic Women's Clubs; Peninsula Heart Association; Peninsula Choral Society; and Peninsula Garden Clubs. The Virginia Peninsula supports a 60-piece Peninsula Orchestra, a 150-voice Peninsula Choral Society, and the Newport News Operatic Society, which is now entering its 16th season. National and international musical artists are presented in three series of annual programs sponsored respectively by the Community Concert Association, the Hampton Institute Musical Arts Association, and the Jewish Community Center. There are two Little Theatre groups, one in Hampton and one in Newport News, and a summer workshop in drama is presented jointly by the two organizations. Campus presentations are staged also by the Hampton Institute Players.

18. The record does not show the number of daily and weekly newspapers published in the Virginia Peninsula but does show that the Daily Press is published in Newport News. The following standard broadcast stations are located on the Virginia Peninsula: WGH, Newport News, 1310 kc, 5 kw, DA-N, unlimited; WYOU,^{19/} Newport News, 1270 kc, 1 kw, daytime; WVEC, Hampton, 1490 kc, 250 watts, unlimited; and WBCI, Williamsburg, 740 kc, 500 watts, daytime.

Engineering Considerations

19. The transmitter site for the proposed Newport News station is on the Smithfield side of the James River, some two miles from the transmitter site of the proposed Smithfield station. Each applicant proposes an identical operation of 10 kw power, non-directional, daytime only, on 940 kc. Both proposals would cause interference to two stations (WXGI, Richmond, and Radio Americana station at Baltimore). However, the interference in each case is of small degree; and, furthermore, both such stations received grants subject to the express condition that such interference as would result from a grant of either the Fischer or the Tidewater proposal would be accepted.

^{18/} The Peninsula Airport Commission was created in 1946 by Act of the Virginia General Assembly for the purpose of building and operating air navigation facilities in the Peninsula Area of Virginia. Members of this Commission represent the communities of Newport News, Hampton and Warwick, and through their efforts an airport was built and airline service instituted in 1949.

^{19/} Now WFID.

Smithfield

20. Based on an effective field (unattenuated at one mile) and ground conductivity values from Figure M-3 of the Rules, 20/ the pertinent area and population data with respect to the proposed operation at Smithfield, Virginia are set forth in the following tabulation:

<u>Contour (mv/m)</u>	<u>Population <u>21/</u></u>	<u>Area (sq.mi.) <u>21/</u></u>
2.0	693,728	2,740
0.5 (normally protected)	853,645	6,615
Interference from WBOC	957	20
Interference from WXGI	7,503	350
Interference from WFNC	9,942	112
Interference from BP-12962 (Baltimore)	29,909	618
Total interference <u>22/</u>	48,311 (5.65%)*	1,100 (16.6%)*
0.5 (interference-free)	805,334	5,515

*Percentages relate to population and area within the normally protected contour.

21. No station provides a 0.5 mv/m signal to the entire area which would receive primary service from Tidewater's proposed station. Station WTAR, Norfolk, provides a 0.5 mv/m or greater signal to more than 75% of the area. Five stations provide such signal to from 50 to 75% thereof; four stations, 25 to 50%; and 33 stations, less than 25% thereof. A minimum of two and a maximum of 18 signals of 0.5 mv/m or greater are available to the portions of the rural area within the proposed primary service area. Stations WDMV, WGAI, WBCI, WTAR, WRAP, WCMS, WRVA, WYOU, 23/ WSH, WAVY, WLPM and WVEC provide a 0.5 mv/m or greater signal to Smithfield. However, the

20/ An exception was made for the Chesapeake Bay where a conductivity of 5,000 mmhos/m was used below the point where the Patuxent and Potomac Rivers enter the bay and 40 mmhos/m was used above this point as well as for portions of the James and Potomac Rivers. Adjustment of this dividing line to a point near Cambridge, Maryland would have had no material effect on the data.

21/ All areas are land areas only; and all population figures in this decision are based upon the 1950 U. S. Census, unless otherwise noted.

22/ As hereinabove set forth, the Commission removed from hearing and granted the applications of Station WXGI, Richmond, Virginia, to increase power from 1 to 5 kw on 950 kc, daytime only; Station WFNC, Fayetteville, North Carolina, to shift to 940 kc, 10 kw day, 1 kw night, using a directional antenna at night; and Radio Americana, Inc., for a new station at Baltimore, Maryland, to operate with 1 kw on 940 kc, daytime only, using a directional antenna. Interference from Station WBOC lies within that from Radio Americana, Inc., Baltimore, Maryland (BP-12962).

23/ Now WFID.

Town of Smithfield, under the Opinion and Order of the Isle of Wight County Circuit Court, 24/ is now, subject to action of the Appellate Court, a community with a population in excess of 2,500; and, as such, a signal strength of 2 mv/m or better is required to serve primary service thereto. Four stations now provide a 2 mv/m or better service to Smithfield, namely, WTAR and WRAP, Norfolk, Virginia; WGH and WYOU, Newport News, Virginia. The 2 mv/m contour of Station WAVY falls just outside of Smithfield, as shown on a 2 mv/m contour map of evidence in this record. Station WLPM, Suffolk, provides a 0.5 mv/m signal but not a 2 mv/m signal to Smithfield. Station WYSR, Franklin, does not provide a 0.5 mv/m signal to Smithfield.

22. Apart from Station WXGI and the new Baltimore station (BP-12962), which received grants conditioned upon acceptance of interference from a grant of the instant proposal, no objectionable interference would be caused to any existing standard broadcast station. The Smithfield proposal is mutually exclusive with that of Edwin R. Fischer, Newport News, Virginia (BP-13114) herein.

23. The Smithfield proposed operation would provide a signal of 25 mv/m or greater to all of the business and industrial areas of the city of Newport News and at least a 5 mv/m signal to the most distant residential section of Newport News. A signal in excess of 2 mv/m would be provided also to the cities of Norfolk, Portsmouth, Suffolk, Williamsburg, South Norfolk, Hampton and Virginia Beach.

24. While Tidewater Broadcasting Company offered evidence in an effort to show a close community of interest between Isle of Wight County and four other nearby counties in Virginia, the proposed Smithfield station would not furnish primary service to all of such 5-county area. The 0.5 mv/m contour of the proposed station would encompass, in addition to Isle of Wight County, all of Nansemond and Surry Counties and substantial portions of Southampton and Suffolk Counties.

24/ According to the Opinion of the Circuit Court in the annexation proceeding, the annexation territory falls into four parts. The area north of Pagan River is referred to as the "North" area; the area north of Route 258 and south of Pagan River is designated as the "West" area; the area south of Route 258 and west of Cypress Creek is called the "South" area; and the portion east of Cypress Creek is termed the "East" area. The real contest in the case has centered around the north area, wherein are located the four principal plants of the three large packers, together with a few other mercantile and commercial enterprises. Two of the packers oppose the annexation and the third has intervened in favor thereof. The board of supervisors of Isle of Wight County did not oppose the annexation. The Opinion points out that there has been a rapid expansion of the three large meat packing concerns located in the "North" area since World War II; that Smithfield has immediately adjacent to its original boundaries an industry employing nearly 1,400 people with a payroll over \$5,000,000 annually; that there is little or no land remaining within the corporate limits for either residential or commercial expansion, and the service concerns and new home builders have pushed out along the three main highways leading from the town and the areas adjacent thereto; and that what was formerly a stable agricultural community of about 1,500 persons has in the space of some ten years become an industrial community of double that figure.

Newport News

25. Based on an effective field (unattenuated at one mile) of 601 mv/m and on ground conductivity values from Figure M-3 of the Rules,^{25/} the pertinent area and population data with respect to the proposed operation at Newport News are set forth in the following tabulation: ^{26/}

<u>Contour (mv/m)</u>	<u>Population</u>	<u>Area (sq. mi.)</u>
2.0	694,798	2,601
0.5 (normally protected)	866,381	6,250
Interference from WXGI and WFNC	6,292 (0.7%)*	425 (6.8%)*
Interference from BP-12962 (Baltimore)	45,059	888
Total interference	51,351 (5.9%)*	1,313 (21%)*
0.5 (interference-free)	815,030	4,937

*Percentages relate to population and area within the normally protected contour.

26. No station provides a 0.5 mv/m signal to as much as 75% of the area which would receive primary service from Fischer's proposed station. Two stations, WTAR, Norfolk, and WRVA, Richmond, provide a 0.5 mv/m or greater signal to from 50 to 75% of the area. Ten stations provide such signal to from 25 to 50%; and 40 stations, less than 25% thereof. A minimum of two and a maximum of 22 signals of 0.5 mv/m or greater are available in the portions of the rural area within the proposed primary service area of Newport News. Stations WCMS, WNOR, WRAP and WTAR, Norfolk; WGH and WYOU, Newport News; WAVY and WLOW, Portsmouth; and WVEC, Hampton, provide a signal of 2 mv/m or greater to Newport News. In addition, Station WLPM, Suffolk, provides such a signal to part of Newport News. Fischer's proposed operation would provide a signal in excess of 25 mv/m to all of Smithfield and would provide a signal in excess of 2 mv/m to the cities of Norfolk, South Norfolk, Virginia Beach, Portsmouth, Hampton, Suffolk and Williamsburg.

^{25/} An exception was made for Chesapeake Bay area where a conductivity of 40 mmhos/m was assumed for the bay north of Cambridge, Maryland and in the inland waterways of the James River, York River, Rappahannock River, Potomac River and Albemarle Sound and a conductivity of 5,000 mmhos/m was assumed for the bay south of Cambridge, Maryland and the open water areas of Albemarle Sound.

^{26/} There are slight differences in the data derived by the Newport News and Smithfield expert witnesses. The figures used in the tabulation are those proposed by the Broadcast Bureau and the Newport News applicant. The differences are inconsequential. At any rate, counsel for Smithfield has agreed to the use of either data.

27. The Newport News proposal is, as has been heretofore stated, mutually exclusive with that of the Smithfield proposal. Apart from interference to Station WAGI, Richmond, and the new station of Radio Americana (BP-12962) at Baltimore, no objectionable interference would be caused to any existing standard broadcast station. ^{27/}

Applicants

Smithfield

28. The officers and stockholders of Tidewater are as follows:

Name	Office	Shares	
		Subscribed	Percent
Vernon H. Baker	President and Treasurer	200	40
C. Brooks Russell	Vice President and Secretary	200	40
Howard W. Gwaltney		50	10
Charles F. Russell*		50	10
*Father of C. Brooks Russell	Total	500	100

Each of the stockholders also is a director of the corporation.

29. Vernon H. Baker, born in Tennessee in 1921, has lived in Virginia since 1949 and now lives in Blacksburg, Virginia. He was graduated from the University of Tennessee, with a BS degree in Electrical Engineering in 1944. Upon graduation from the University, Mr. Baker was commissioned an Ensign in the Naval Reserve and served as a radio material officer. His naval duties included the testing of radio, radar and sonar equipment and operation of FM naval communications on the West Coast. After release from active duty, Mr. Baker returned to the University of Tennessee and, in 1948, received a BS degree in Agricultural Engineering. He then attended Michigan State University under a fellowship and was awarded a MS degree in 1949. As a part of his fellowship, he prepared an electrical engineering handbook which was widely distributed. Upon graduation from Michigan State, Mr. Baker was employed by the Virginia Polytechnic Institute (VPI) at Blacksburg, Virginia, as an associate research professor. In 1952 he obtained a leave of absence and, under a grant of the Rockefeller Foundation, returned to Michigan State for advanced research on the use of radiation for the cold sterilization of foods. After receiving a PhD degree from Michigan State in December 1953, Dr. Baker returned to VPI and was promoted to full professor. While attending Michigan State, he took collateral courses in

^{27/} See paragraph 22, supra.

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radio and television station management, and assisted with some production work on the University's closed circuit television studio and radio workshop.

(a) In 1949, he received a Class A amateur radio license (W4LMU) and, in 1952, a First Class Radiotelephone operator's license. He still holds these licenses. While at VPI, Dr. Baker also served as advisor to the educational radio editor of the VPI Extension Service which prepares tapes for use by radio stations in Virginia. From 1954 to 1956, he was faculty advisor to the VPI student station, WUVT, a low power carrier current station.

(b) In 1954, Dr. Baker filed an application for a construction permit for a new standard broadcast station at Christiansburg, Virginia, approximately seven miles from Blacksburg. The application was granted, Dr. Baker constructed the station himself during spare time, including construction of many items of equipment and installation of all equipment and wiring, and operation began in the fall of 1954. Although a full-time manager was employed, Dr. Baker devoted most of his spare time to operation of the station. His wife served as women's director, bookkeeper, and office manager. The station, WBCR, received a number of public service awards and made a modest profit from the beginning. In early 1956, Dr. and Mrs. Baker filed an application for a new standard broadcast station at Florence, South Carolina. Because of interference problems, Dr. Baker made field strength measurements and amended the application a number of times, finally reducing the proposed power from 1 kw to 250 watts. In the meantime, he became interested in establishing a station on the Eastern Shore of Virginia. He had become acquainted with the area while working at VPI. Dr. and Mrs. Baker joined with C. Brooks Russell, a resident of the area, and filed an application for a construction permit for a new standard broadcast station at Tasley, Virginia. When the application was granted in the fall of 1957, Dr. Baker obtained a leave of absence from VPI and constructed the station (WESR) which began regular operation in January 1958. The license later was assigned to a corporation, The Accomack-Norhampton Broadcasting Company, Incorporated, the present licensee. Dr. Baker is president, a director and 60% stockholder, C. Brooks Russell is vice president, a director and 40% stockholder. Mrs. Baker is secretary-treasurer and a director. In the fall of 1957 when the Tasley station was being constructed, the Commission granted the Florence application. Upon completion of construction at Tasley, Dr. Baker returned to VPI to complete his research projects. On June 1, 1958, he resigned from VPI to devote his entire time to broadcasting. Dr. Baker sold Station WBCR, Christiansburg, on June 1, 1958. He then constructed and placed in operation in November 1958 Station WYNN at Florence. Because of the large Negro population and the fact that no station in the area was providing a program service directed primarily for that population, Dr. and Mrs. Baker decided to provide such a program service. They soon learned that such an operation required a unique background and experience which they did not possess. After some months, they sold Station WYNN to a group which owned stations in other areas specializing in service to Negro populations.

27. The Newport News proposal is, as has been heretofore stated, mutually exclusive with that of the Smithfield proposal. Apart from interference to Station WIGI, Richmond, and the new station of Radio Americana (BP-12962) at Baltimore, no objectionable interference would be caused to any existing standard broadcast station. 27/

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30. During his years at VPI, Dr. Baker travelled often to the Tidewater Virginia Area and spent an average of two months a year at the VPI Research Station at Holland, a few miles from Smithfield. He had often considered the possibility of establishing a broadcast station in the Smithfield area and when the Commission lifted the freeze on 940 kc applications, Dr. Baker organized Tidewater. In doing so, he recognized the desirability of having a local businessman and civic leader as a part owner of the station. Howard W. Gwaltney agreed to join in the venture. C. Brooks Russell's father, Charles F. Russell, also agreed to join. They all agreed that 50% of the stock would be owned by Dr. Baker and Mr. Gwaltney, and the remaining 50% would be owned by the Russells. Because Mr. Gwaltney was not interested in the amount of stock he owned, it was agreed that Dr. Baker would own 40% of the stock to be issued. Dr. Baker was responsible for preparing Tidewater's application, including the engineering. The application was filed in January 1959. From the time the application was filed to the time of the hearing, Dr. Baker devoted about a third of his time to the prosecution of the application and preparation for the hearing. In September 1958, Dr. Baker filed an application for construction permit for a new standard broadcast station at Chester, Virginia. He later dismissed the application to devote his time to Tidewater. He also has joined with some old friends in an application for a construction permit for a new standard broadcast station at Xenia, Ohio, and has a 50% partnership interest in that application, which is pending before the Commission.

31. Dr. Baker has served as a member of the official board of his church and recently was elected a trustee of the church. He is a member of the Blacksburg PTA, has served on its public relations committee, and has participated in work intended to provide new elementary schools in the area. He has been a member of the pack committee of the Blacksburg Boy Scouts for four years, and is a member of Hunters' Masonic Lodge of Blacksburg. Dr. Baker was a member of the Lions Club of Blacksburg for some years but resigned because he was required to travel so much. During the period he owned Station WBCR, he participated in practically every fund-raising drive and campaign in the Blacksburg-Christiansburg area. He is a registered professional engineer in the states of Virginia and Tennessee, and a member of the following professional societies: Institute of Radio Engineers; American Society of Agricultural Engineers; National Society of Professional Engineers; Virginia Society of Professional Engineers; and The Honorary Research Society of Sigma Xi.

32. If and when the instant application is granted, Dr. Baker will move to Smithfield and devote his full time to Tidewater as general manager and engineering director. He will construct the station, with outside help when required. His wife will devote her full time to the station as women's and public service director. Her duties will include office management and bookkeeping. Mrs. Baker has a degree in home economics and has worked with women's groups and public service organizations.

33. C. Brooks Russell, born in 1924, has lived his entire life, except for preparatory school and military service, on the Eastern Shore of Virginia, and is presently a resident of East Point, Onancock, Virginia. During World War II he served in Europe and remained in the

Army until January 1947. After discharge from the Army, he was employed as a theodolite operator taking and recording data on falling bombs and rockets at the Chincoteague Naval Air Station, now Wallops Island. In 1947, Mr. Russell enrolled at the Peabody Conservatory of Music in Baltimore, and during the next year worked part time at Station WCBM in Baltimore as a program analyst and announcer. After a year, he returned home to work for his father as foreman of a real estate development. From 1949 to the spring of 1957, he worked part time at Station WBOC, Salisbury, Maryland. His duties included announcing, singing, selling, and preparing public service announcements and programs for organizations and events on Virginia's Eastern Shore. During the first six months of 1957, Mr. Russell worked in the same capacity except singing at WDVM, Pocomoke City, Maryland. In 1953, he left his father's employment and became a salesman for a candy company. In 1955, he went into business for himself and established a wholesale drug company. Mr. Russell had been considering a broadcast station on the Eastern Shore when, late in 1955, he met Dr. Baker. After about six months of meetings, telephone calls and letters, Mr. Russell joined Dr. and Mrs. Baker in a partnership which applied for what now is Station WESR, Tasley, Virginia. When the application was granted, Mr. Russell liquidated his wholesale drug company so he could devote his full time to Station WESR as general manager. He has served in that capacity since the station took the air in January 1958. Mr. Russell is an active member of the Masonic Lodge; Veterans of Foreign Wars; Eastern Shore Chamber of Commerce; the Lions Club of Onancock; and his church in Onancock. He was an active member of the Junior Chamber of Commerce until he reached the age limit for such organization. Mr. Russell plans to devote from one and a half to two days each week to assisting in the program direction and public service of the Smithfield station.

34. Howard W. Gwaltney was born in Smithfield, Virginia, in 1908 and, except for three years while attending college, has spent his entire life in Smithfield. After attending local schools, he attended Washington and Lee University at Lexington, Virginia. His principal occupation is president, since 1936, and 31.32% stockholder of Gwaltney, Incorporated, packer of genuine Smithfield hams, bacon, sausage, fresh pork and provisions. Mr. Gwaltney has been president, a director, and chairman of the board of the Bank of Smithfield since 1935; and president and a director of the Gwaltney Realty Development Corp. Mr. Gwaltney was elected mayor of Smithfield in 1952 and re-elected in 1956, for four-year terms. He has served on many committees for community betterment. He was instrumental in having the Town of Smithfield employ consulting engineers to make a study of the area in and around Smithfield in preparation for annexation. As noted above, the order of the Court granting the annexation has been entered, effective December 31, 1960, but is now on appeal. Mr. Gwaltney has been a member of the official board of his church in Smithfield since 1932; recently was elected to the board of trustees of Ferrum Junior College, Ferrum, Virginia, for a five-year term; and has been a member of the board of trustees of the Tidewater Virginia Development Council since its inception. Over a period of years Mr. Gwaltney has headed and actively participated in fund-raising drives for almost every organization in the Smithfield area, including the Red Cross, Boy Scouts, Cancer Drive, Heart Fund and Polio. At the time of the hearing, he was engaged in soliciting funds for the independent colleges of Virginia.

(a) Mr. Gwaltney became interested in establishing a broadcast station at Smithfield through Dr. Baker. When Tidewater's station begins operation, Mr. Gwaltney plans to pay close attention to the operation of the station to make certain that the needs of the area are being met and that the station is an asset to Smithfield. He plans to be available for consultation at all times and work closely with the other stockholders. Dr. Baker plans that Mr. Gwaltney will act as an advisor on local public service and civic affairs.

35. Charles F. Russell was born in 1887 in Accomack County, on Virginia's Eastern Shore, and has lived his entire life in that area. After experience in farming, brick laying and plastering, he became a contractor and built schools, office buildings, plants and other buildings throughout the area. In 1931 he disposed of his contracting business and a burial vault business acquired in 1912, and established the Whispering Pines Hotel-Motel at Accomack, Virginia. Most of his time since 1931 has been devoted to improving and operating Whispering Pines and real estate in Accomack County. In 1935, he took an active part in the organization of a group to promote the route known as the Ocean Highway running from Maine to Florida. Mr. Russell was elected president of that organization in 1940 and was re-elected in 1946. In 1952, he was instrumental in organizing the Eastern Shore of Virginia Chamber of Commerce, which now has more than 300 members. In 1954, he was appointed director of The Virginia State Chamber of Commerce and vice president of the Tidewater District. Recently he was appointed to serve a second term. Mr. Russell is an active member of his church, which he helped build; Masonic Lodge; Khedive Temple (Shrine) of Norfolk; and past president of the Rotary Club of Onancock, Virginia. He also is president of Whispering Pines, Inc. Mr. Russell became interested in broadcasting through his son, C. Brooks Russell, and constructed and leased the building which houses Station WESR at Tasley. Mr. Russell plans to attend directors' meetings, review the record of operation of Tidewater's station both as to finances and program service, and participate in the formulation of policies. Because he has reached retirement age and does not travel as much as he formerly did, he will be able to devote some time to the proposed station, if his services are needed.

Newport News

36. Edwin R. Fischer, the applicant for Newport News, was born in New York City in 1916. He has been a resident of Washington, D. C. since 1941. He received an AB degree from Columbia University in 1937, an MA degree in Economics from Columbia in 1939, LLB degree from Georgetown University in 1946, and an LLM degree from Georgetown in 1952. From 1939 to 1941, he served as an instructor in Business Administration, College of Commerce, Louisiana State University. From 1941 to 1945, he held several positions with the War Production Board, including that of Chief of Statistics, General Industrial Equipment Division. Then, after eight months service as an economist for the Bureau of National Affairs in Washington, D. C., Mr. Fischer joined the Office of the General Counsel, Office of the Quartermaster General, Department of the Army, as an attorney.

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Early in 1951, he transferred as an attorney to the Office of the General Counsel, Office of the Chief of Transportation, Department of the Army. Since April 1955, he has been an attorney specializing in tax and financing in the Office of The Judge Advocate General, Department of the Army, Washington, D. C. Mr. Fischer has been active in church work since 1936, having served as a Sunday School teacher, camp counselor, choir member, lay reader, building fund committeeman, Junior Warden and Senior Warden of his church. He served the Legal Aid Bureau in Washington as a volunteer attorney from 1946 to 1949. He has published a number of articles in the fields of international trade, money, banking and finance. Mr. Fischer is a member of the Bars of the United States Supreme Court and District of Columbia; the Federal Bar Association; Delta Theta Phi; and Beta Gamma Sigma.

(a) While serving as president of several church groups, he produced a number of programs on subjects which varied from "Polar Navigation" to "Peace Through Understanding" to geographical programs on various foreign countries and from panel discussions on matters such as "Detective Story" to talks on "Paris by Night" and "Some Aspects of Space Travel". For these programs, Mr. Fischer obtained the participation of journalists, congressmen, Federal Government officials, and Embassy officials. None of these programs were broadcast.

(b) In the spring of 1959 he became actively interested in broadcast station ownership and retained an attorney and consulting engineer to study the availability of facilities in a number of Virginia cities. When the reports indicated facilities were available in the Newport News-Norfolk and Winchester, Virginia, areas, he prepared and filed applications for construction permits for new standard broadcast stations in Newport News and Winchester. He had been interested in the Newport News-Williamsburg area for some time and had made many trips to the area. After dismissal of a mutually exclusive application, with which it had been consolidated for hearing, Mr. Fischer's application for a station at Winchester was granted. ^{28/} At least during its initial stages of operation and for some further period of time, the extent of which is not clear in the record, Mr. Fischer will perform the duties of general manager of his New Winchester station and devote about one-third of his time to its operation. There is some confusion in the record as to whether, or at least when, he would resign his present position with the United States Government. He made the unequivocal statement in his direct testimony that in the event of a grant of his instant application, he would resign his position, move to Newport News and devote full time to his proposed Newport News station. However, some confusion is engendered by his answers on cross-examination.

Other Broadcast Interests

37. Tidewater Broadcasting, applicant herein, has no other broadcast interests. However, its officers and principal stockholders have such interest

^{28/} Fischer's Winchester application was granted on October 5, 1960. (FCC 60-1145). Official notice has been taken of Commission records which show that the construction permit since has been assigned to Shenval Broadcasting Corporation, of which he is sole stockholder, and that on January 27, 1961, the station (WHPL) was authorized to commence program tests.

(a) Station WESR - Tasley, Va. (1330 kc, 1 kw power, DA, daytime only). The two principal stockholders of Tidewater, Messrs. Baker and Brooks Russell, are the sole stockholders of the licensee of Station WESR. Tasley is situated in Accomack County on Virginia's Eastern Shore. Station WESR was founded early in 1958 and was the first radio station on the Eastern Shore of Virginia.

(b) Xenia, Ohio application. Dr. Baker is also a 50% partner in Greene County Radio, applicant for new station in Xenia, Ohio (1500 kc, 500 watts, daytime only). This application was designated for hearing in April 1961.

38. Edwin R. Fischer, the Newport News applicant herein, is the sole stockholder of permittee of one other station.

(a) Station WHPL - Winchester, Virginia (1600 kc, 500 watts power, DA, daytime only). The construction permit for this station was granted in October 1960 and it is now on the air under program test authorization. Mr. Fischer as an individual applicant was granted the construction permit and, thereafter, assigned it to Shenval Broadcasting Corp., of which he is the sole stockholder.

Past Broadcast Records

39. The principals of Tidewater Broadcasting Company have a record of broadcast operation in connection with three radio stations. Vernon H. Baker has been associated with the ownership and operation of radio broadcast Station WBCR, Christiansburg, Virginia, Station WNN, Florence, S. C., and Station WESR, Tasley, Virginia. The first two stations have now been sold by Dr. Baker. C. Brooks Russell, another of the officers and principals in the Smithfield proposal, is also associated in the ownership and operation of Station WESR.

40. Edwin R. Fischer had no record of past broadcast operation at the time of the hearing.

Smithfield Principals' Record

41. Station WESR, which began operation in 1958, is a 500-watt, daytime only, station operating in a town of less than 1,000 population, without network affiliation. C. Brooks Russell is the general manager of Station WESR.

42. Based on an analysis of data contained in the original proposal and the 1960 renewal application, as amended August 16, 1960, ^{29/} the

^{29/} The application was granted and the license of the station renewed for a regular 3-year term ending October 1, 1963.

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record during the composite week of performance vs. promise for this station, percentagewise, is as follows:

Type or Class	Original Proposal	Renewal Application (As Amended)
Entertainment	65.3%	70.5%
Religious	9.1	11.9
Agricultural	7.9	2.8
Educational	0.8	1.9
News	10.5	9.3
Discussion	0.3	—
Talks	2.4	3.6
Miscellaneous	3.7	—
Network commercial	—	—
Network sustaining	—	—
Recorded commercial	55.1	56.4
Recorded sustaining	17.2	24.4
Wire commercial	7.9	6.5
Wire sustaining	0.3	1.8
Live commercial	5.4	8.8
Live sustaining	14.1	2.1
Total commercial	68.4	71.7
Total sustaining	31.6	28.3
Hours of operation	83	85-3/4
No. of spot announcements	590	805
No. of NCSA's	125	141

During the course of the hearing in this proceeding, the composite was re-analyzed ^{30/} and the renewal application amended to reflect such reanalysis.

43. The Eastern Shore of Virginia is exposed to hurricanes, high tides, and strong ocean winds, and is served by only one main highway which runs from the lower end of the peninsula north to Maryland and Delaware. Traffic to the south has a 26-mile trip by ferry before reaching the Norfolk area. Much of the economy of the area is based upon fishing and agriculture. Because weather is important and frequently is different from that in the cities with weather bureaus, Station WESR constructed and operates its own weather station which, together with special reports from Richmond, form the basis for hourly weather broadcasts. The station works with the Eastern Shore Ministerial Association and broadcasts live, on a sustaining basis, a ten-minute program week days and a 15-minute program on Saturdays. From March 30 to December 31, 1959, 40 ministers representing 40 churches

^{30/} The renewal application as originally filed shows 0.6% in the agricultural and 0.8% for the educational categories.

in 25 Eastern Shore communities appeared on the Monday through Friday program. The Saturday program is devoted to church announcements and news of churches in Accomack and Northampton Counties and is conducted by a minister. A 5-minute program each week day afternoon, although sponsored by a commercial organization, presents religious music and a thought for the day. A local church service is broadcast in its entirety each Sunday morning. Other religious programs on Sunday include two and a half hours of religious music and a half hour talk in the morning, and a 30-minute transcribed program of talks by leading citizens of the country on a wide variety of subjects of an inspirational nature. In addition, frequent announcements are broadcast without charge for every church and similar event when a request is received. Two agricultural programs featuring talks and reports of the County Extension Agent and the Home Demonstration Agent of Accomack County, bulletins, and live market reports are broadcast daily except Sunday. In addition, special programs and announcements are broadcast for farm groups such as the 4-H Club and the Virginia Forestry Department. During the early rocket activity of the NASA, Station WESR broadcast warning bulletins to the many fisherman and oystermen of the area that certain areas would be closed. In cases of inclement weather and school openings and closings announcements are broadcast. News of school activities and appearances of students are broadcast on a two-hour program each Saturday afternoon. At irregular intervals throughout the school year, groups of students record programs such as musical presentations, dramatic productions, debates and talks for broadcast by Station WESR. Announcements of meetings and other school activities are broadcast for the Parent-Teachers Associations and schools throughout the school year. Station WESR has co-operated with various charitable organizations such as the Crippled Children's Society, and Tuberculosis Society in broadcasting notices of activities and appeals for funds, clothing and other items. A 5-minute program each Saturday morning presents news for veterans. On behalf of the Northampton-Accomack Memorial Hospital, the station has broadcast many appeals for blood donors. A study of the program logs for 1959 calendar year shows that more than 316 hours were devoted to programs and announcements on behalf of 46 different agencies and organizations. Station WESR has received awards from the United States Air Force; Veterans of Foreign Wars, Post 4856; Care; March of Dimes; Second United States Army Recruiting District; and the Wachapreague Volunteer Fire Department. The station is a member of the National Association of Broadcasters and subscribes to the NAB Standards of Good Practice.

44. Station WBCR. Discrepancies, percentagewise, between promise and performance are noted in Baker's operation of Station WBCR during the composite week shown in its first renewal application. There, the original application proposed 6% agricultural, 1.1% educational and 3.6% discussion programs; and the renewal application reported that 0.68% agricultural, 0.29% educational and no discussion programs during the pertinent composite week were presented.

Proposals

Smithfield

45. Dr. Baker, working with C. Brooks Russell, prepared the proposed program schedule which was submitted with the original application. The proposed program schedule, which consisted only of the starting time of each program, a brief program title, and the classification as to type and source required by the Commission's application form, was based upon their knowledge of the area and prior broadcast experience. Following the filing of the application in January 1959, Dr. Baker devoted about a third of his time to prosecution of the application and preparation for this hearing. In the eleven months which followed, he made at least nine separate trips to Smithfield. During each visit, he discussed the proposed station and program ideas and policies with Mr. Gwaltney and others. Although Dr. Baker had some rather definite ideas and thoughts concerning the content of specific programs listed by title in the proposed program schedule, the stockholders thought it desirable to contact various organizations and their leaders to obtain suggestions to be incorporated in the actual programs and to make certain that the organizations and their leaders would cooperate in the preparation and presentation of the programs. On or about March 1, 1960, Dr. Baker and Mr. Gwaltney wrote some 92 persons or organizations in the Tidewater Virginia area inviting comments for use as a guide in the program planning. An unspecified number of replies were received. In June 1960, Dr. Baker met with Mr. Gwaltney and C. Brooks Russell and arranged to contact personally various leaders in the area to review the program proposals and to obtain suggestions to be incorporated in the program descriptions. Between June 17 and 29, 1960, Dr. Baker personally met at least once with at least 36 persons representing or affiliated with some 36 agencies and organizations in the Tidewater Virginia area, with four persons at Virginia Polytechnic Institute at Blacksburg, and with seven persons in Newport News representing a like number of organizations on the Virginia Peninsula. A number of persons were contacted more than once. The written descriptions of the programs then were revised and enlarged to incorporate many of the suggestions received during and as a result of the contacts.

46. The following policies would be followed in the operation of the station: commercial spot announcements would be limited to one minute in length with most 30 seconds or less; a maximum of three minutes in any fourteen and a half minute segment would be devoted to commercial messages; non-commercial spot announcements would be "sufficient" to serve the non-profit, civic and welfare groups; in addition to non-commercial spot announcements, 15-minute sustaining programs would be aired for organizations such as the Governor's Highway Safety Committee, Red Cross, United Fund, Heart Fund, and Care; short editorials, following the Commission's recommendations in its report on editorializing by broadcast licensees, would be made; all recognized churches of the area would have access to the station as time would permit, with first preference to those not now with opportunity to broadcast over other stations - the regularly scheduled programs would be supplemented during various seasons of the year such as Thanksgiving, Christmas and Easter, and the morning devotions, church

announcements and the regularly scheduled church service on Sunday would be presented on a sustaining basis; time for discussion of public issues would be made available on an equal basis to groups or individuals representing both sides of an issue - the failure of one side to accept the invitation to such programs would not preclude the appearance of the opposite side - and a special roundtable type of program, "County Forum," would be provided regularly in order for the public to participate in discussions of subjects of civic interest; time would be made available to candidates for public office on an equal basis at regular commercial rates, and candidates would be invited to participate on the "County Forum" program without charge; no bait and switch or per inquiry advertising would be accepted; advertising of alcoholic beverages other than beer and wine would not be accepted; beer, wine or cigarette advertisements would not be broadcast in any program produced especially for the young audience; advertising of proprietary medicines would not be accepted if the method of presentation or nature of the product may be offensive to the listeners; and no information would be broadcast that could be conceivably used by gamblers or racketeers; extremes in musical selections would be avoided - a well balanced and variety of musical programs will be presented - and all recordings will be auditioned before being broadcast to avoid broadcasting undesirable or improper lyrics.

47. The statistical analysis of the proposed program schedule, based upon operation from 6 a.m. to 6 p.m. week days, and from 7 a.m. to 6 p.m. on Sundays, a total of 83 hours a week, is as follows:

<u>Type</u>		<u>Source</u>	
Entertainment	65.3%	Recorded commercial	55.00%
Religious	9.1	Recorded sustaining	17.40
Agricultural	7.9	Wire commercial	8.03
Educational	0.8	Wire sustaining	0.03
News	10.5	Live commercial	5.44
Discussion	0.3	Live sustaining	<u>14.10</u>
Talks	2.4		
Miscellaneous	<u>3.7</u>	Total commercial	68.47
		Total sustaining	<u>31.53</u>
Total	100.0%	Total	100.00%

The miscellaneous entry arises from week day programs, "Music for My Lady" and "Kitchen Kapers", which will be described below. A maximum of 870 commercial and a minimum of 65 non-commercial spot announcements are proposed.

(a) Entertainment: The period from 6:00 to 8:00 a.m. daily except Sunday, would present popular music, accurate time checks, weather reports and temperature readings, driving conditions, and other short items of local interest. Five minutes of news at 6:00 and 7:00 a.m. would be included. Local singing groups as guests and recorded music would be presented on "Top of Morning," daily except Sunday from 8:15 to 8:30 a.m. "Music For My Lady," week days ^{31/} from 9:30 to 11:00 a.m., would feature personality

^{31/} Week days, as used in this paragraph means Monday to Friday, inclusive.

interviews with information of particular interest to women interspersed throughout with musical selections. Representatives of women's clubs, garden clubs, and others would appear as guests to discuss their welfare and civic projects. Discussions of new books would be presented by the librarian of the community library. Buyers from local stores would be asked to discuss the latest in fashions. Five minutes of news would be included in the program. On Saturdays, the period from 9:30 to 10:00 a.m. would present "Kitchen Kapers," a continuation of "Music For My Lady," but with an emphasis on the kitchen. The programs would be produced by the station's women's director. The period from 9:30 to 10:00 a.m., daily except Sunday, was classified as miscellaneous because of the varied content of the program. "Dinner Bell Show," 11:15 a.m. to noon, daily except Sunday, would present folk music, ballads, and country artists to meet general appeal. "Gospel Songs," 12:30 to 1:00 p.m., daily except Sunday, would present hymns, spirituals and gospel songs including tape recordings of local groups, glee clubs and choirs. "Country Hits," 1:00 to 2:00 p.m., daily except Sunday, would present popular country and western music for the large rural coverage area. "Request Time," 2:05 to 3:00 p.m., daily except Sunday, would feature all time favorite popular albums and written requests for selections. Latest popular releases and records and discussions of new trends in music and new releases would be broadcast on "Top Tunes," daily except Sunday, from 3:05 to 5:00 p.m. No so-called "Top 40 List" of any national magazine or survey would be followed on this program. "Teen-Age Party," 5:30 to 6:00 p.m., daily except Sunday, would be a variety type of program featuring teen-agers from the various high schools in the area and presenting interviews, discussions, and recorded music. The subjects would be of interest to youths. Some of the programs would be recorded in the schools and others presented live from the studios. The following programs would be presented only on Sundays. "Quartets," 7:05 to 8:00 a.m., would present recordings, quartet groups and taped and live selections of local groups. "Local Quartets," 9:00 to 10:00 a.m., would feature local talent. Amateur groups and civic clubs and churches would be invited to participate. A mixture of folk songs, hymns and spirituals would be presented. "Sabbath Songs," 10:05 to 11:00 a.m., would feature quiet, easy recorded music of the sing-along type and instrumental music. "Glee Club," noon to 12:30 p.m. and 12:45 to 1:00 p.m., would present local groups in the area as well as choirs and glee clubs of the College of William and Mary and Hampton Institute, and national groups such as the Salt Lake Tabernacle Choirs, the Southern Baptist Convention Choir and The Tuskegee Institute Spiritual Singers. "Sunday Down South," 3:00 to 5:00 p.m., would be a variety type program presenting popular music between the following short features spaced about equally in the show: U. S. Government Report featuring transcribed programs of the U. S. Marines, U. S. Air Force, and other government agencies; "Guest Star" prepared by the U. S. Treasury Department; "This Is Civil Defense," a 5 to 10-minute program, produced in cooperation with local, state and national civil defense officials; and tape recordings by members of Congress. In between the short features, time signals, weather reports, and road and driving conditions would be presented for the Sunday driver. "Dinner Music," 5:15 to 6:00 p.m., would blend soft, easy instrumental music for relaxation and enjoyment during the dinner hour.

(b) Religious Programs: The religious programs have been planned to fulfill the needs of the area west of the James River--Tidewater Virginia, and if time would permit, to supplement the needs of the area on the east side of the James River--the Virginia Peninsula. Announcements and portions of other than religious programs also would be made available to churches and church organizations, such as the Calendar of Events program. "Devotions," daily except Sunday from 8:30 to 8:45 a.m., would present a different minister each week from churches in Smithfield and Isle of Wight County in cooperation with the ministerial associations. Participation on the program would not be limited to members of the associations, ministers of churches on the Virginia Peninsula would be able to participate after the ministers of churches in Tidewater Virginia have been accommodated. The program would consist of a spiritual message and appropriate religious music and would be taped in advance, if so desired by the minister. "Gospel Songs," 12:30 to 1:00 p.m., daily except Sunday, would present recorded hymns and gospel songs from all churches. "Church Service," Sunday from 11:00 a.m. to noon, would present by remote control a service direct from one of the area churches. The program for one month would originate from one church in order to minimize the cost of lines and installations. The program would be rotated among the churches. "Minister," Sunday from 1:00 to 3:00 p.m., would present interdenominational sermons, songs and devotions intended for persons unable to attend church or who do not have a church home. Examples of the program are the "Old Fashion Revival Hour", Billy Graham, and "Back to the Bible."

(c) Agricultural Programs: In the preparation of agricultural programs, the station would work closely with agricultural officials, including the county agents and home extension agents, Virginia Polytechnic Institute, the Farm Bureau, the United States and Virginia Departments of Agriculture, and various agricultural and garden clubs. The latest research findings on peanuts, soya beans, and swine production from the Tidewater Agricultural Experiment Station at Holland, Virginia, and the Virginia Truck Crop Experiment Station at Norfolk would be presented. "Agricultural Review," 9:00 to 9:15 a.m., daily except Sunday, on week days would be produced primarily for the women and on Saturdays would be devoted to 4-H Club work. The programs would include talks by the county home agents of the extension service as well as work with garden clubs and home demonstration clubs. On Saturday, the 4-H Club programs would present reports of club activities and discussions of problems and progress in their work. In producing these programs, representatives of the station would meet with representatives of the various agencies and groups at regular intervals. "Market Report," daily except Sunday from 12:05 to 12:15 p.m., would feature a complete resume of market conditions for all agricultural commodities sold in the listening area. Each day a check would be made with the three major packing plants in Smithfield as to prices being paid at their buying stations in Virginia and North Carolina. The wire service reports for prices paid for grain and livestock in Richmond, Norfolk, Baltimore and other points would be given. Prices paid for truck crops would be gathered and reported from the Virginia Department of Agriculture. A report on prices paid for oysters and seafood also would be presented. "Farm News," 12:15 to 12:30 p.m., week days, would be a farm and home type of program

with news of interest to the farmer and farm family. The program time would be divided about equally between the local county agents and the research specialists of VPI. In addition, recorded programs of the Farm Bureau would be presented. "Agricultural Reports," 5:00 to 5:15 p.m. week days, would be primarily a news type program with reports on agriculture as related to industry of the area. Some of the programs would feature interviews and guest speakers.

(d) Educational Programs: "School Days," Saturday from 10:05 to 10:45 a.m., is intended to aid in solving the increased enrollment, teacher shortage, and rising cost of operation of the schools of Smithfield, Isle of Wight County, and neighboring communities. The program would be used to point out the problems existing in the schools, new courses of instruction, new teaching methods, and similar developments, and would include science reviews by students and teachers, and discussions by members of the PTA and school officials.

(e) News Programs: The station would employ a full-time news director and stringers or part-time reporters throughout its service area. All station personnel would be indoctrinated in the gathering of news and the evaluation of news events. Listeners would be encouraged to phone news to the station which would be checked before being used on the air. Telephone beeper readings would be used. Regular and frequent contact would be maintained with the more common sources of news such as law enforcement officers, hospitals, governmental officials and military establishments. In addition to regular news programs, bulletins would be aired as received. The station would subscribe to a national news wire service for coverage of state, national and international news. All newscasts would include weather reports and forecasts. A complete U. S. Weather Bureau approved station would be installed. During heavy traffic periods, traffic and road conditions would be presented. Times of high and low tides at strategic locations in the area would be broadcast. Special events in the area, such as county fairs, graduation exercises, outings, athletic contests, public meetings, fund-raising campaigns and church festivals would be broadcast by remote control or tape recordings. "State and World News," 6:00 to 6:05 a.m., daily except Sunday, would present overnight news and any local bulletins received. "News and Weather," 7:00 to 7:05 a.m. daily, would be similar to the 6:00 a.m. program but will provide additional coverage. "News and Weather," 8:00 to 8:15 a.m. daily, would present a comprehensive report on local, national and international news, weather reports and forecasts, tide reports, fishing and water activity news, and summaries of sporting events and scores. "Calendar of Events," 8:45 to 9:00 a.m., daily except Sunday, would present news of all major civic events, meetings, church affairs, school announcements, and summaries of organization activities. On Saturday, about half the program would be devoted to religious news. "State, National and World News in Brief," 10:00 to 10:05 a.m. and 11:00 to 11:05 a.m. daily, and "Local, National and International News," noon to 12:05 p.m. daily, are described by the titles. "News," 2:00 to 2:05 p.m. and 3:00 to 3:05 p.m., daily except Sunday, would present an up-to-date summary of local, state, national and

international news, weather reports and forecasts, and sport scores. "Local and Regional News," 5:00 to 5:15 p.m., Saturday and Sunday, would feature a comprehensive report of local and regional news with a summary of the previous week's local highlights. "Hunting and Fishing News," 12:15 to 12:30 p.m. Saturday, would be presented in cooperation with the local game wardens and sportsmen of the area, and would feature reports of research on marine life from the Virginia Commission of Fisheries laboratory at Gloucester Point, Virginia, summaries of the past week's seafood catch by sportsmen and commercial companies, and forecasts for the coming week. During hunting seasons, news concerning deer, quail and water fowl would be presented.

(f) Discussion Programs: "County Forum," Saturday from 10:45 to 11:00 a.m. would be a forum or round-table discussion of topics of current interest moderated by the station's news director, upon which would appear leading citizens of the area and members or representatives of school boards, city councils, law enforcement and fire departments, tax departments, labor unions, industries, military establishments, welfare departments, social security officers, and unemployment compensation commission.

(g) Talk Programs: "Movie Calendar," 5:15 to 5:30 p.m. daily except Sunday, would list showings at area and drive-in theaters, interesting stories about show business, recordings of personalities, and music from motion pictures. "Shopping Time," 7:30 to 8:00 a.m. Saturday, would feature the station's women's director and would present shopping hints and talks in cooperation with the chambers of commerce, food distributors, and department stores in the area.

Studios and Transmitter

48. Tidewater's general offices, studios and transmitter would be housed in a building to be constructed at the transmitter site near Smithfield.

Staff

49. At the outset, the staff would consist of nine full-time and one part-time employees. As noted previously, Dr. Baker plans to move to Smithfield and devote his full time to work as general manager and engineering director, and Mrs. Baker plans to serve full time as women's and public service director and would be responsible for office management and book-keeping. Other full-time employees would be a news director; two sales representatives, one of whom would serve as commercial manager; one secretary; one copy writer; and two announcers. The part-time employee would be an announcer. Each of the announcers and the sales representatives would assist in the preparation of continuity and copy. One of the announcers would hold a first-class radiotelephone operators license. One of the sales representatives would be able to announce. The staff would be enlarged after the initial period of operation.

Newport News

50. A transmitter site on the west bank of the James River in Isle of Wight County near Smithfield and close to the site proposed by Tidewater was selected by Fischer on the basis of engineering considerations.

51. While in excess of two months elapsed between the time Edwin R. Fischer decided to file the application at Newport News and the date on which it was executed and filed, he prepared the actual program proposals for his Newport News and Winchester applications "immediately before the filing" ^{32/} of such applications, both of which were signed and filed on May 15, 1959.

52. Before the Newport News application was filed, Mr. Fischer visited the area, read Newport News newspapers and listened to the radio stations in Newport News and Hampton. Subsequent to the filing of the application, Mr. Fischer wrote, telephoned or visited representatives of various organizations for the purpose of "determining the need of each organization for the proposed facility and to relate that need to public service time to be made available to the organization on the proposed station for the civic, educational and cultural purposes, as the case might be, of each organization." In making his contacts, Mr. Fischer "stated his plans for making time available to such organizations and then confirmed the offer by letter." In addition, he employed two persons, one a resident of Smithfield and the other a resident of Newport News, who also made some contacts. Contacts were listed as follows: Newport News, 49 organizations, of which one was contacted by telephone only, 39 were contacted by telephone with a follow-up letter, 5 were contacted in person with a follow-up letter, and 3 were contacted both by telephone and in person with a follow-up letter; "Lower Peninsula", 32 organizations, of which 25 were contacted by telephone with a follow-up letter, 3 were contacted in person with a follow-up letter, and 4 were contacted both by telephone and in person with a follow-up letter; Hampton, 6 organizations, of which 4 were contacted by telephone call with a follow-up letter and 2 were contacted both by telephone and in person with a follow-up letter; York County, 10 organizations, of which all were contacted by telephone with a follow-up letter; Smithfield, 9 organizations, of which one was contacted by telephone with a follow-up letter; 6 by telephone and in person with a follow-up letter, and one by letter; Isle of Wight County, excluding Smithfield, 17 organizations, of which 7 were contacted by telephone with a follow-up letter, 3 were contacted in person with a follow-up letter, 4 by telephone and in person with a follow-up letter, and 3 by letter only; Surry County, two organizations, both by telephone and in person with a follow-up letter; Williamsburg, two organizations, both by telephone and in person with a follow-up letter; Jamestown and Yorktown

^{32/} Mr. Fischer testified that, by "immediately before the filing", he meant "perhaps two weeks before." He took 11 hours of annual leave from his full-time Defense Department position between March 1, 1959 and May 31, 1959. This leave included 8 hours on March 31 and 3 hours on April 13, 1959.

each one contact by telephone and in person with a follow-up letter; Gloucester, one contact in person with a follow-up letter; and Norfolk, two contacts, one by telephone with a follow-up letter and the other only by letter. The proposed program schedule submitted with the original application of May 1959 was not amended as a result of the contacts.

53. Fischer's proposed program service is intended to serve the residents of the Virginia Peninsula - the cities of Newport News, Hampton and Williamsburg, and the counties of York and James City - and the area west of the James River which he has called the West Bank - the counties of Isle of Wight and Surry. He proposes little, if any, program service for residents of Norfolk and Portsmouth - which are within the proposed station's primary service area. ^{33/} It is Fischer's stated belief that "the average listener will not be offended or driven away by the interposition of five minutes of non-musical broadcasting if that five-minute segment is prepared and produced with sufficient care and presented in a sufficiently interesting manner." Many of the policies which Fischer proposes to follow were combined with descriptions of some of the proposed programs. However, the following policies were set forth concerning controversial issues, editorializing and political broadcasts. When controversial issues would be considered, opposing points of view would be fairly treated. The proposed station would take an editorial position on many subjects and would make time available for presentation of opposing views. Fischer would "try to make some time available on a free basis for candidates for the more important political offices." Other policies which would be followed would be to promote in all possible ways the best interests of the community and area and to encourage residents to take a greater interest in their affairs; to view every special event of significance occurring within its area as an invitation and challenge for special radio coverage; and to present frequent weather and time checks, including interruption of regular programming when emergency conditions threaten.

54. An analysis of the proposed program schedule, based upon operation from 6 a.m. to 6 p.m., seven days a week, a total of 84 hours a week, is as follows:

<u>Type</u>		<u>Source</u>	
Entertainment	68.9%	Recorded commercial	57.1%
Religious	3.3	Recorded sustaining	12.2
Agricultural	4.6	Wire commercial	8.7
Educational	1.5	Wire sustaining	2.9
News	10.2	Live commercial	10.1
Discussion	0.6	Live sustaining	<u>9.0</u>
Talks	9.5		
Sports	<u>1.4</u>	Total commercial	75.9
		Total sustaining	<u>24.1</u>
Total	100.0%	Total	100.0%

^{33/} Mr. Fischer's testimony with respect to his interest, or lack of it, in Norfolk and Portsmouth was summarized by his own counsel in these words, "He stated he had very little, if any, interest in Norfolk and Portsmouth. Mr. Booth has a number of admissions from him in that respect."

The analysis also contemplates that 504 commercial and 200 non-commercial announcements would be broadcast.

(a) Entertainment Programs: For purposes of musical and entertainment programs daily except Sunday, Fischer blocked out five different periods or "shows" during the broadcast day. Four similar periods are proposed for Sunday. In each instance, the periods or "shows" would be "interrupted" from time to time for non-entertainment programs, usually five minutes in length. The following programs would be presented daily except Sundays: "Hampton Roads Timeclock," 6:10 to 9:00 a.m., would present bright, lively music interspersed with time checks; "West Bank Watch," 9:05 to 11:00 a.m., would present pops, ballads, old favorites, and some country and western music; "Hampton Roads Merry-Go-Round," 11:05 a.m. to 1:00 p.m., would present show tunes and album music; "West Bank Watch," 1:05 to 3:00 p.m., would be similar to the morning program of the same title; "Nine Forty Jamboree," 3:05 to 5:55 p.m., would be keyed to the younger audience and would present swing, country and western, classic jazz and "top forty" selections. The programs which follow would be presented only on Sunday; "Sunday Musicale," 6:10 to 9:00 a.m., would present semi-classical instrumental and vocal music; "West Bank Parade," 9:05 to 11:00 a.m., would be the same as the week day program except that country and western music would not be presented; "Nine Forty Serenade," 12:50 to 2:30 p.m., would feature string ensembles and muted popular music; "Sunday Road Show," 3:05 to 5:55 p.m., would present popular music consisting of show tunes, albums, and restrained, ballad-type tunes. The station would "look for" performances of broadcast calibre by local groups to augment its entertainment programming.

(b) Religious Programs: "Morning Devotional," 6:00 to 6:05 a.m., daily; and "Meditations," 11:55 a.m. to noon, daily except Sunday, would present on a rotating basis clergymen of all denominations; "Church Calendar," 10:45 to 10:55 a.m., Saturday, would present announcements of services, sermons, guest ministers, and special music planned by churches for the following day. "Bible Readings," 7:45 to 8:00 a.m., Sunday, would be presented by resident or visiting ministers in rotation and would include comments as well as reading of the text. "Hymn Time," 9:45 to 10:00 a.m., Sunday, would present both choral and organ music. "Sunday Church Service," 11:00 a.m. to noon, Sunday, would be rotated among churches selected with the cooperation of the Peninsula Christian Ministers Association and the Ministers Association for the Smithfield area, the principal ministerial associations in the two areas. During summer months, visiting clergymen would be presented.

(c) Agricultural Programs: "Farmers' Report," 6:15 to 6:20 a.m., daily except Sunday, would present market reports from the wire service and bulletins on a variety of agricultural topics and organizations; "Farmers' Report," 9:15 to 9:20 a.m., daily, would be for the farm wife and would present principally tapes from the U. S. Department of Agriculture and Virginia Polytechnic Institute, selected with the assistance of the local county agents; "Farmers' Report," 10:15 to 10:20 a.m., daily except Sunday; "Farmers' Report," 11:15 to 11:20 a.m., daily except Sunday, would present general background information on peanut, hog, and dairy farming

and techniques used in other areas, and taped talks or interviews with agricultural experts from VPI and the U. S. and Virginia Departments of Agriculture on current farming programs; and "Farmers' Report," 8:15 to 8:30 a.m., Sunday. "Fisheries Report," 8:15 to 8:20 a.m. and 12:15 to 12:20 p.m., daily except Sunday, would present news items of interest to commercial fishermen, including information as to types of fish running, weather reports and forecasts, and talks on a wide variety of subjects. "Garden Care," 1:15 to 1:20 p.m., daily except Sunday, and 6:45 to 6:55 a.m., Sunday, the latter sustaining, would be directed primarily to the urban and suburban homeowner. In addition to the above programs, some material on the "West Bank Reporter" may also be agricultural in nature.

(d) Educational Programs: "School Board Time," 3:15 to 3:25 p.m., daily except Sunday, would be devoted primarily to talks, interviews and discussions on educational and allied problems and would cover all levels of education and a wide variety of subjects such as library and scientific research techniques, bibliographies and library usage, adult educational opportunities in night schools and extension courses, PFA and student council activities, and budget problems of the public school system. From time to time, instructive lectures by faculty members of Hampton Institute and William and Mary College would be presented. "High School Diary," 3:45 to 4:00 p.m., Saturday, would be produced by high school students under the auspices of the school authorities and would include such items as school news, sports, excerpts from high school plays, debating teams, availability of part-time employment, and reports of student council activities.

(e) News Programs: With but one exception on Sunday morning, five-minute news programs would be presented each hour. The hourly "Newscasts" would be international, regional, state, and local news from the wire service, supplemented by news received from local sources. All such programs were classified as wire. Two full-time reporters would be employed to gather news in the Hampton Roads area - Newport News, Hampton and York County - for the "Hampton Roads Reporter" and one full or part-time reporter would be employed to gather news in the West Bank area - Isle of Wight and Surry Counties - for the "West Bank Reporter." Stringers also will be employed. "Hampton Roads Reporter," a five-minute program, classified as talk, would be presented daily at 6:30 a.m., 7:30 a.m., 8:30 a.m., 12:30 p.m., 3:30 p.m., 4:30 p.m., and 5:30 p.m. and daily except Sunday, 11:30 a.m., and would present items of principal concern to the Hampton Roads area, including Newport News, Hampton, James City County, and York County. The 6:30 a.m. program would present news obtained overnight. The 7:30 a.m. program would feature a calendar of local events scheduled for that day and would be a repeat of the preceding day's 3:30 p.m. program. The 8:30 a.m. program would feature a civic or charitable organization and would include a taped interview with a personality or officer of the organization. The 11:30 a.m. program would give more extensive treatment of an item of local importance. The 12:30 p.m. program would contain local news collected since the early morning program. The 3:30 p.m. program would feature a calendar of local events scheduled for the next day. The 5:30 p.m. program would be a roundup of local events of the day or a repeat of a previous program. "West Bank Reporter," a five-minute program classified as

talk, would be presented daily at 9:30 a.m., 10:30 a.m., and 1:30 p.m., and daily except Sunday, 2:30 p.m., and would present items of principal concern to Smithfield, Isle of Wight County and Surry County. The 9:30 a.m. program would feature a calendar of local events scheduled for that day. The 10:30 a.m. program would feature a West Bank civic or charitable organization similar to the 8:30 a.m. "Hampton Roads Reporter." The 1:30 p.m. program would present a feature dealing with an item of interest and importance to the West Bank area. The 2:30 p.m. program would be devoted almost exclusively to local news. The reporters also would maintain the station's liaison with civic and charitable organizations to encourage them to use the station's facilities.

(f) Discussion Programs: "Hampton Roads Forum," 2:30 to 3:00 p.m., Sunday, would present representatives of varying points of view discussing current problems and national affairs with emphasis upon those of peculiar concern to the area. Discussions and interviews would be presented from time to time on other programs.

(g) Talk Programs: In addition to the programs classified as talk which have been described above under other classifications, "Spotlight Military," 4:55 to 5:00 p.m. daily, would present news of the military establishments in the area and information concerning military benefits and developments, and veterans affairs. "Report from Washington," 5:45 to 5:50 p.m., Saturday, would present on a rotating basis reports by the Congressmen of the area and the two Senators from Virginia.

(h) Sports Programs: "Sports Roundup," 7:15 to 7:20 a.m., daily except Sunday; "Sports Final," 5:15 to 5:20 p.m., daily except Sunday, and 5:45 to 5:50 p.m. on Sunday; and "Sports Roundup," 3:45 to 3:50 p.m. Sunday.

Studios and Transmitter

55. Fischer's main studio would be located at a site to be determined in Newport News. An auxiliary studio would be installed at the transmitter site, about $4\frac{1}{2}$ miles from Smithfield in Isle of Wight County. ^{34/} While Fischer stated that "we will be able to originate programs from the transmitter at Smithfield where we will also maintain an auxiliary studio," there is no evidence as to which local live programs, if any, will actually be originated from the auxiliary studio.

Staff

56. Fischer proposes to serve as general manager and program director and would be in charge of and responsible for the over-all operations of the station. The time to be spent at Newport News is not entirely clear

^{34/} Under cross-examination, Mr. Fischer testified that he did not tell his interviewees on the west (Smithfield) side of the James River that a grant of his application would preclude a grant of the other application; that he did tell such individuals his application was for the "Smithfield area", "stated affirmatively that the studio would be at Newport News" and also told them that the station, if granted, would be licensed to Newport News. He did not tell them that a resident of Smithfield was interested in the competing application.

in view of his commitments to the Winchester station. ^{35/} In his direct case, Mr. Fischer stated that, in the event of a grant of his instant application, he would resign his Government position and move to Newport News and serve as "sole owner and general manager of the station". On cross-examination he also testified that he intended to resign his position, ^{36/} in the event of a grant of the Newport News application. Mr. Fischer testified that he would devote "on an over-all basis perhaps a third of my time during the initial phases of the Winchester operation". He further explained that he did not mean one-third of a 40-hour week but one-third of the 7-day week. He also stated that he did not intend to move to Winchester. The other staff members would include an assistant manager, a bookkeeper-secretary, three announcers, three reporters, a research chief who also would serve as assistant program director, three engineers, and three salesmen, one of whom would serve as sales manager.

^{35/} He testified that he would spend approximately a third of his time at the Winchester station during its construction and initial period of operation. He further testified on cross-examination that, while he would rely on professional help there, he would contribute to the extent he could and, in his own words, "Whether the actual title would be general manager would depend on future circumstances which I cannot precisely predict at this time. * * * * What I am saying is that the duties I would perform would perhaps be in excess of those which I would expect of a general manager generally."

"Q. You will be responsible for the day to day operation at Winchester, will you not?"

"A. I would be."

"Q. And you will be?"

"A. I will be."

^{36/} When asked when he would resign, he stated that, "I may resign under any number of circumstances. For example, if I dispose of the Oxon Hill tract of 192-1/2 acres, that alone might be a sufficient occasion, though not requirement, for me to resign. On the other hand, I might resign in the event that I am fortunate enough to get a Winchester grant".

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CONCLUSIONS

1. This proceeding involves the applications of Tidewater Broadcasting Company, Incorporated, and of Edwin R. Fischer, each requesting authorization for a new standard broadcast station to operate on 940 kc with a power of 10 kw, daytime only, at Smithfield and Newport News, Virginia, respectively. Each of the applicants has been found by the Commission to be legally, technically, financially and otherwise qualified to construct and operate the radio station proposed, except as to applicable issues specified in the order of designation. ^{1/} Simultaneous operation of the two proposed stations would result in mutually destructive interference and, thus, only one of the applications may be granted.

2. The objectionable interference which would be received by the proposed operations does not exceed 10% of the population within the normally protected contour with respect to either proposal. Thus, neither violates Section 3.28(c)(3) of the Rules.

3. Apart from Station WXGI (Richmond, Virginia) and the new Baltimore station, Radio Americana (BP-12962), which received grants conditioned upon acceptance of interference from a grant of either of the instant proposals, no objectionable interference would be caused to any existing standard broadcast station by the Smithfield or the Newport News proposal.

4. Smithfield, Virginia had a 1960 population of 917 within its then corporate limits. Smithfield has, however, taken steps to annex additional territory in Isle of Wight County, which would increase its 1960 population to a total of 2,633. ^{2/} By highway, Smithfield is 23 miles from Norfolk and 19 miles from Newport News. No standard broadcasting station is allocated to Smithfield. The Tidewater proposal at Smithfield would provide a new primary service daytime to 805,334 persons residing in an area of 5,515 square miles. Forty-three stations serve portions of the rural area therein, with 2 to 18 stations serving varying portions thereof. This proposal would place a 25 mv/m or greater signal over not only Smithfield, but over all of the business and industrial area of Newport News, and would also place at least a 5.0 mv/m signal over the entire residential section of Newport News. Twelve stations provide a 0.5 mv/m or greater signal and 4 stations provide a 2 mv/m or better signal to Smithfield.

5. Newport News, with a 1960 population of 113,662, ^{3/} is a part of the Newport News-Hampton Standard Metropolitan Statistical Area, which has a

^{1/} The text of all issues is set forth on pages 2-4, supra.

^{2/} While the final order of the Circuit Court of Isle of Wight County has been entered granting the annexation petition, effective December 31, 1960, such order was appealed. However, the order was not stayed.

^{3/} The 1950 population of Newport News was 42,358. The large increase in population which is shown by the 1960 population figures is due to annexation of territory, since the area which constituted Newport News in 1950 showed a slight decrease in population at the time of the 1960 Census. (See footnote 15, page 8, supra.)

population of 224,503. Two standard broadcast stations are already allocated to Newport News and one to Hampton. The Newport News proposal would provide a new primary service daytime to 815,030 persons residing in an area of 4,937 square miles. Fifty-two stations serve portions of the rural area therein, with two to 22 stations serving respective portions thereof. Nine stations, including two Newport News stations, one Hampton station, four Norfolk stations and two Portsmouth stations, place a 2 mv/m or greater signal over all of Newport News and another one serves a portion thereof. Williamsburg, Virginia, with a 1960 population of 6,832 persons, would receive its second 2 mv/m signal from the Fischer proposal, as well as from the Smithfield proposal. The Fischer proposal would also place a 25 mv/m signal over, not only all of the business and industrial area of Newport News, but over all of Smithfield.

6. Since only one of the applications can be granted, a determination must be made, in the light of the mandate of Section 307(b) of the Communications Act of 1934, as amended, as to which of the instant proposals would better provide a fair, efficient and equitable distribution of radio service. (See Issues 14 and 20, page 3, supra.)

7. While there is no issue in this proceeding with respect to whether or not Smithfield is a community for purposes of Section 307(b), the Broadcast Bureau has, nevertheless, urged the conclusion that it is not such a community. 4 The Commission, by action in adding issues

4 There is cited in support of such position, Huntington Broadcasting Company, 5 RR 721, 6 RR 569 (1950); Consolidated Broadcasting Industries, Inc., 19 RR 1374 (1960); and Radio St. Croix, FCC 59-1258, Mimeo. No. 81065, Corrected (1959). An examination of these citations shows that the last two were Memorandum Opinions and Orders in which specific issues were added to determine the very question of whether or not the communities there involved were in fact separate communities for purposes of Section 307(b). No such issue with respect to Smithfield is contained in the original order of designation (released in 1959) or in various later Memorandum Opinions and Orders adding issues in this proceeding. Moreover, in the case of the mutually exclusive applications for stations at McLean, Virginia (Docket No. 13251) and Potomac-Cabin John, Maryland (Docket No. 13227), both within the official Washington, D. C. metropolitan area, an issue (No. 12) was added with respect to whether or not the Maryland application would serve a community within the meaning of Section 307(b) of the Communications Act, while none was added with respect to the McLean application.

(Footnote 4 continued on following page)

regarding the separateness of communities in Consolidated Industries, Inc., 19 RR. 1374 (1960) and also in Radio St. Croix, FCC 59-1258, Mimeo. No. 81065, Corrected (1959), as well as the addition of such issues with respect to other applications and localities formerly a part of this proceeding, leads to the conclusion that it is now and has been for several years, at least, the policy of the Commission to add an issue relative thereto when such a question is involved in a proceeding. See Northwest Broadcasters, Inc., Docket 11925, FCC 61-771, Mimeo. No. 5420, decision released June 26, 1961, and Order of remand, released September 18, 1958, FCC 58-877, Mimeo. No. 62684, where the Commission added a specific issue to determine whether the city of Bellevue is a separate community as contemplated by Section 307(b) of the Communications Act. See also Musical Heights, Inc., Memorandum Opinion and Order released October 23, 1959 (FCC 59-1069, Mimeo. No. 78655), where the Commission denied as untimely a petition to add an issue as to whether or not Braaddock Heights was a "city, town or other political subdivision" within the meaning of Section 3.30 of the Commission's Rules, coming as it did a year after the order of designation and after the hearing had been closed. This action of the Commission was affirmed by the U. S. Court of Appeals for the District of Columbia Circuit (15,936), Richard F. Lewis, Jr., Inc., of Waynesboro, et al. v. FCC, decided June 1, 1961. However, since the question has been raised by the Bureau, a discussion of certain factors with respect to the relationship of the two communities here involved seems pertinent.

8. Smithfield, the principal city of Isle of Wight County and one of the service centers of an area lying west of the Norfolk-Portsmouth Standard Metropolitan Area and across the James River from and generally southwest of the Newport News-Hampton Standard Metropolitan Area, is located in a separate county and is not a part of any metropolitan area. Newport News is the principal city of the Newport News-Hampton Standard Metropolitan Statistical Area and of the Newport News-Hampton Urbanized Area, both as fixed by the United States Government - as well as of the area lying between the James and York Rivers which has been termed the Virginia Peninsula. The evidence establishes that the Virginia Peninsula has many characteristics and interests which are not common to the neighboring area lying across the James River to the west. The economy of the area lying west of the James River is based largely upon agriculture and light, diversified manufacturing; whereas, the economy of

(Footnote 4 continued from preceding page)

It is noted that those two applications were formerly a part of the over-all proceeding of which the Smithfield and Newport News applications were then also a part. Likewise, with respect to another application in the same over-all proceeding, the question of whether Catonsville, Maryland, a suburb of Baltimore, was a separate community within the meaning of Section 307(b) was specifically placed in issue by the Commission. It is believed that Issues 20 and 21 herein (See page 3, supra) clearly contemplate that both Smithfield and Newport News are communities within the purview of Section 307(b).

Newport News and the Virginia Peninsula is based largely upon shipping and allied industries of the port of Newport News, and military establishments. The factual situation here is different from that which obtained in Huntington Broadcasting Company, 5 RR 721, 6 RR 569. There the municipality of Huntington Park was contiguous to, was readily accessible from, had common interests with the city of Los Angeles and was an integral part of the officially defined Los Angeles Metropolitan District. Here the municipality of Smithfield is not contiguous to, nor readily accessible from Newport News. The two municipalities are not a part of the same metropolitan district. They are separated by the James River, are accessible to each other only over a highway toll bridge. They are served by different telephone systems and have different school systems, churches, civic and welfare groups, as well as different local governmental services.

9. There is no doubt whatsoever that Smithfield is, in fact a separate community. It is a long-established incorporated municipality with a mayor-council form of government and has its own court system, public works, water system, fire and police departments, city officers, business centers, public parks, town hall and community center, and public library. Certain other services, such as schools, are provided through joint efforts of the town and Isle of Wight County. Likewise, certain civic clubs, drives, etc. encompass the entire county. No local governmental or civic function or service is shown to have any relationship with Newport News. See recent decision of Commission in re Alkina Broadcasting Co., et al., released June 26, 1961, FCC 61-773; Mimeo. No. 5393.

10. As was pointed out in its Memorandum Opinion and Order denying reconsideration of decision in Re Huntington Broadcasting Company, et al., supra, "it is the Commission's view, as shown by our decisions, that where a principal city and a suburb are competing for a frequency, and both applicants propose to serve substantially the same areas and populations, the term 'communities' as used in Section 307(b) is not limited in definition to that of legal municipalities, cities and states, but may include other community organizations, such as metropolitan districts, depending upon the facts of the proceeding. As further shown by our decision, the Commission has always viewed the question of what constitutes in any specific case, a community within the meaning of Section 307(b) in the light of a combination of factors, such as (1) the type of frequency involved, (2) the coverage proposals of the respective applicants, (3) the definition and description of the use of standard broadcast stations as prescribed by the Commission's

Rules and Regulations and Standards of Good Engineering Practice, (4) the definition and description of communities used by the Census Bureau, and (5) the facts adduced at the hearing concerning the proposed use of a particular frequency including the relationship and the distance between the cities where the competing applicants propose to establish their respective stations." 6 RR 569, 572. (Underscoring supplied)

11. Here, as in Huntington Broadcasting Company, supra, a Class II station is involved. The applicants each propose an operation which will serve substantially the same area. Smithfield and Newport News do not possess sufficient common interests or characteristics for the Budget Bureau to place Smithfield or Isle of Wight County - or any of the other counties which Tidewater has demonstrated have some community of interest with Smithfield - in the metropolitan area of Newport News-Hampton, either statistical area-wise or urbanized area-wise. Thus, the criterion of metropolitan district does not apply here. There is no local transit service between the areas. The only public transportation service between Smithfield and Newport News is a once-a-day service by Trailways. To travel by private automobile, it is necessary to pay a cash toll of 90¢ per crossing - or the commuter rate of 55¢ when ten tickets are purchased at one time - to cross the James River toll bridge, which is the only means of access from one area to the other.

12. On the average, almost 3,000 daily newspapers are circulated in Isle of Wight County, of which 63.5% are published in Norfolk, 29.2% are published in Suffolk, and only 7.3% in Newport News. Trailways Bus System also provides one trip daily to Suffolk and six trips a day to Norfolk-Portsmouth. The respective volume of newspaper circulation and the number of bus trips handling traffic between the areas would indicate that there is greater community of interest between the Norfolk area and Smithfield than between Newport News and Smithfield. Thus, if Smithfield can be said to be a satellite of any large city in the area, it must be concluded that it gravitates more toward Norfolk than toward Newport News. It is also noted that the relationship between Newport News and Norfolk is such as to place them in separate and distinct metropolitan areas, despite their proximity.

13. Unless due recognition is given to the claims of smaller communities lying outside - but nearby - metropolitan districts, an undue concentration of facilities in larger communities can result, which would, in turn, result in impairment, if not actual degradation, of opportunity for local self-expression for the smaller community. The Commission has long and consistently held that an opportunity for local self-expression is a cornerstone of fair distribution of facilities. Apart from the fact that there is no issue questioning the status of the right of Smithfield to receive consideration on a 307(b) basis, the facts in this case are clearly distinguishable from those in the Huntington Park case, where the Commission held that the overall metropolitan area was the community there to be served. Here Smithfield, with surrounding area, is neither an integral part of Newport News nor of the Newport News-Hampton Metropolitan or Urbanized Areas and has been shown to have substantially different economic background and interests.

14. The question of which community has "the greater need for a new facility" must now be resolved. As already indicated, it has long been established by decisions of the Commission and the courts that the term "radio service" as used in Section 307(b) includes both transmission and reception service. Transmission service is the availability of a readily accessible station and studio to provide an outlet to the residents of a community for local self-expression and the production of programs of special interest to that community. Reception service, on the other hand, is merely the presence in any area of a signal of sufficient strength to meet the Commission's standards for primary service. Of the two, transmission service is far the more important. Utica Observer-Dispatch, Inc., 3 RR 265 (1946), Newark Broadcasting Corp., 3 RR 839 (1947) and Northwestern Ohio Broadcasting Corp., 3 RR 1945 (1948). In determining the community to be served by a station, consideration is given to the facilities or class of station proposed, as well as the characteristics of the community to which the station would be licensed. Huntington Broadcasting Co., 5 RR 721 (1950), 6 RR 569, 572 (1950), affirmed 192 F. 2d 33 (1951); Rossmoyne Corp., 7 RR 117; Pawtucket Broadcasting Co., 4 RR 1345; St. Louis Telecast, Inc., 12 RR 1289, 1369 (1957); Manchester Broadcasting Co., 14 RR 219 (1958); Broadcasters, Inc., 16 RR 295 (1957).

15. No standard broadcast station is located in Smithfield or Isle of Wight County. Only two are located in the five-county Tidewater Virginia area on the western side of the James River. One such station, WLPM, located at Suffolk, some 19 miles from Smithfield, provides a 0.5 mv/m signal, but not a 2 mv/m signal to Smithfield; and the other one, Station WYSR, located at Franklin, 26 miles from Smithfield, does not supply even a 0.5 mv/m signal to Smithfield. Two of the four stations which provide a reception service of 2 mv/m or greater to the Smithfield area are located 23 miles distant by highway, at Norfolk; and two are located 19 miles distant, by highway, at Newport News. None of these stations can be said to be readily accessible to Smithfield and the "West Bank" Tidewater Virginia area, particularly when consideration is given to the distances, lack of local public transportation and the intervening toll bridges and tunnels. By comparison, four standard broadcast stations are located on the Virginia Peninsula. Two are located in Newport News, the city in which Fischer proposes another station; one is located at Hampton, which is a part of the same metropolitan and urbanized area; and one is located in nearby Williamsburg. Newport News receives service of 2 mv/m or greater from four stations in Norfolk, two in Portsmouth, in addition to the three stations located in Newport News and Hampton.

16. It is, therefore, concluded that, despite the disparity in population, under the facts and circumstances here obtaining Smithfield and surrounding area has a greater need for a first local radio outlet for local self-expression than Newport News has for a third such outlet and its metropolitan area has for a fourth outlet.

Comparative Considerations

17. Both applicants have been found to possess the basic qualifications to become a licensee and each would "provide service ^{5/} to the community determined to have the greater need for a new facility". It must now be determined which of the proposals of the two applicants would better serve the public interest in the light of evidence adduced with respect to (a) the background and experience of each having a bearing on the applicant's ability to own and operate the proposed station; (b) the proposal of each with respect to management and operation of the proposed station; and (c) the programming service proposed by each. Various factors or criteria have been developed by the Commission over the years in comparative proceedings. These criteria include such factors as local residence, civic participation, diversification of business interests, broadcast experience, integration of ownership and management, diversification of media of mass communications, among others.

18. Local Residence. Howard W. Gwaltney, a minority stockholder and a director of Tidewater, is a lifelong resident of Smithfield. Vernon H. Baker, the president-treasurer and one of the major stockholders who is now a resident of Blacksburg, Virginia, will move to Smithfield in the event of a grant of the Tidewater proposal. The other two stockholders of Tidewater (Messrs. Russell) are lifelong residents of the Eastern Shore of Virginia and have stated no intention to change their place of residence. Edwin R. Fischer, the other applicant, now a resident of Washington, D. C., will move to Newport News in the event his application is granted. Tidewater merits a preference on the factor of local residence.

19. Civic Participation. Only one of the stockholders in either of the applicants has any record of civic participation in the local area. Such stockholder is Howard W. Gwaltney, a minority stockholder and a director of Tidewater, who during his lifetime residence in the area has been active in the life of the community, having served on many organizations for community betterment and actively participated in fund-raising drives, over a period of years, for almost every organization in the Smithfield area. Mr. Gwaltney has also served as mayor of Smithfield since 1952. Mr. Gwaltney is, and has been since its inception, active in the Tidewater Virginia Development Council. He is, and has been for almost 30 years, a member of the official board of his church. He is also a member of the board of trustees of a Junior College in southwest Virginia,

^{5/} The Commission stated, in its Memorandum Opinion and Order dated May 25, 1960 (Mimeo. No. FCC 60-593), that the term "service", as used in Issues 20 and 21, "means the service which, under our Rules, an applicant is required to provide to the community which it has designated in its application as the community it proposes to serve. Thus, if community A is the favored community under Section 307(b), an applicant for community B will be considered comparatively with applicant for community A only if it meets all of the requirements of our Rules which applicants for community A are required to meet".

and was at the time of the hearing engaged in soliciting funds for the independent colleges in Virginia. Vernon H. Baker, one of the two large stockholders of Tidewater, who is also a director and president and treasurer of the applicant, has a record of civic participation in Blacksburg, Virginia, his present residence, which includes membership on the official board of his church, PTA work, Boy Scout work and fraternal organization work. C. Brooks Russell, who is a stockholder, officer and director of the Tidewater applicant, is and has been for many years active in civic, religious and fraternal life on the Eastern Shore of Virginia. Charles F. Russell, although he is now in semi-retirement, is active in chamber of commerce work on a statewide and regional basis. The senior Mr. Russell is also active in his church, the Rotary Club, the local Masonic Lodge on the Eastern Shore of Virginia, and in the Shrine Temple at Norfolk. Edwin R. Fischer, the individual applicant for Newport News, has no record of civic participation in the area, but he has been active in his church and has served as a volunteer attorney in the Legal Aid Bureau in Washington, D. C. On the factor of civic participation, Tidewater merits a decided preference over Fischer.

20. Diversification of Business Interests. The business interests of the stockholders of Tidewater include active participation in radio broadcasting, meat packing, real estate, hotel operation, ^{wholesaling of drugs,} and building construction. Fischer, the Newport News applicant, is an attorney employed by the Federal Government who also recently became the owner of a radio station. He also has an interest in a tobacco farm and owns some real estate. Tidewater has by far the greater degree of diversification of business interests and is entitled to a preference on this factor.

21. Diversification of Media of Mass Communications. Neither of the applicants, or a principal thereof, owns any communications media in either the Newport News area or the Smithfield area. Fischer is the sole owner of a radio station in Winchester, Virginia. Tidewater Broadcasting itself owns no broadcast station or other media of mass communications. However, Messrs. Baker and Brooks Russell are the owners of Station WESR at Tasley, Virginia, located on the Eastern Shore of Virginia. The two minority stockholders of Tidewater have no interest in any media of mass communications. No decisional difference exists under this criterion.

22. Integration of Ownership and Management. Integration of ownership and management with the day-to-day operation of a station lends assurance that the operation of the station will be in the public interest, especially from a long-range point of view. Here, Fischer, the individual applicant for Newport News, would serve as general manager and direct the day-to-day operation of his station. Baker, ^{6/} the president and a director

^{6/} Mrs. Baker, his wife, will also devote full time to the station operation in the capacity of women's and public service director and will be responsible for office management and bookkeeping.

of Tidewater, who is also one of the major stockholders of the corporation, would likewise serve as general manager and direct the day-to-day operation of the Smithfield station, on a full-time basis; Brooks Russell, the other officer and major stock owner of Tidewater, would devote from one and a half to two days per week to the operation of the Smithfield station. Mr. Gwaltney would be available for consultation at all times and act as an advisor on local public affairs and civic affairs. Each of the four stockholders would participate in the over-all operation of the station in their capacity as directors of the corporation and in the formulation of policies. While the actual percentage of ownership participation in the day-to-day operation would be greater in the case of Fischer, the broader participation by Tidewater, coupled with the fact that the Tidewater station would also be under the day-to-day management of one of the owners, more than offsets any advantage Fischer might otherwise have because of greater percentage of ownership engaged in the day-to-day station operation. No decisional difference exists under this criterion.

23. Broadcast Experience. In the field of broadcast experience, Tidewater merits a decided preference, since its two major stockholders, one of whom will devote full time and the other a day and a half to two days a week to the day-to-day operation of the proposed Smithfield station, have had several years of experience in the ownership and operation of radio broadcast stations. On the other hand, although Fischer received a construction permit for a station at Winchester, Virginia, during the course of the hearing in this proceeding, he has had no other connection with the broadcast industry.

24. Past Broadcast Records. Neither of the applicants has any past broadcast record for comparison. However, two of the principals of Tidewater do have such a record compiled in connection with three radio stations. Dr. Baker has been associated with the ownership and operation of stations in Christiansburg and Tasley, Virginia, and Station WYNN in Florence, South Carolina. Brooks Russell has been associated with the ownership and operation of the Tasley station. The record with respect to the South Carolina station shows little in connection with its operation, other than that it was proposed as a station whose program service was to be directed primarily to Negro population and that Dr. and Mrs. Baker soon learned that such an operation required background and experience which they did not possess; and, after a few months, the station was sold to a group which specialized in service to Negro populations. While Stations WBCR and WESR have generally been operated on an over-all basis in the public interest, certain shortcomings are to be found in their operation. In the case of WBCR, promise outdistanced performance in the fields of discussion, agriculture and, to a less degree, educational programming during the composite week which was shown in its first renewal application. Likewise, Station WESR promised that 0.3% of time would be devoted to discussion programs and its first renewal application showed that no such programs were carried during the pertinent composite week; and also promised that 7.9% of the time would be devoted to agricultural programs; whereas, not to exceed 2.6% was so devoted during the composite week. While such shortcomings and variances between performance and promise are not to be condoned, it is noted that

in each case they occurred in the first licensing period and that the licenses were renewed for the full terms. As already noted, Fischer has no past broadcast record for comparison.

25. Staff. The differences in staffing plans are not sufficient to justify any decisional preference between the applicants; both are adequate to effectuate the program proposals.

26. Studios. While there is no decisional difference between applicants on the adequacy, size-wise, of their main studios, Tidewater is entitled to a substantial preference because the location of its main studio is readily accessible to Smithfield; whereas, Fischer's is to be located in Newport News. In reaching this determination, consideration has been given to Fischer's proposal for an auxiliary studio at his transmitter site, some 4½ miles from Smithfield, which would be much more accessible to Smithfield than would be his main studio in Newport News. While the main studio of a station must be located in the community which the station proposes to serve and cannot be moved without prior authorization from the Commission, an auxiliary studio may be moved or abandoned at will. Even though discontinuance of the auxiliary studio might be deemed unlikely, little weight can be attached to its presence. Southern Indiana Broadcasters, Inc., 15 RR 349, 358-359. Moreover, no definite plan to use such studio to originate local programs was shown. Certainly, residents of Smithfield and surrounding West Bank area would have no real interest in the point of origination of recorded programs and little, if any, in the point of origination of local programs designed especially for Newport News. For example, it would not matter to Smithfield area residents where the church service of a Newport News church or local election news of Newport News are placed on the air.

27. As already indicated, the Commission has held that little, if any, weight can be given to auxiliary studio proposals. In Lawton-Ft. Sill Broadcasting Co., 7 RR 1216, 1234 (1953), the Commission said, "We cannot regard as significant the fact that KMCO, Chickasha, maintains an auxiliary studio at Anadarko; since the hours of operation of that studio may be curtailed or it may be discontinued by KMCO at its discretion without permission of the Commission". Also, in Connecticut Electronics Corporation, 5 RR 469, 510, the Commission held that,

"In allocating facilities under Section 307(b) of the Communications Act of 1934, as amended, so as to provide a 'fair, efficient and equitable' distribution of radio services * * * *
* * *, the Commission has determined that the location requested by an applicant for its main studio shall be considered the location of the proposed station, and the licensee of a standard broadcast station may not move its main studio out of the borough or city in which it is located without first making written application to the Commission for authority to so move, and securing written permission for such removal. On the other hand, no permission is required, under Commission Rules, for the establishment, curtailment, or removal of auxiliary or secondary studios, since they do not affect the primary objective of the licensee, which it must be assumed, is to serve the needs and interests of the community in which its main studio is located." (Emphasis supplied)

To the same effect, in Southern Indiana Broadcasters, Inc., supra, the Commission stated:

"No weight is given to the presence of the auxiliary studio of Station WBNL, Boonville, Indiana, which has been operating in Newburgh since shortly after this case was designated for hearing. Not only is it subject to discontinuance at any time, but the evidence indicates that its use had been limited to one hour daily Monday through Friday and that it had been used to a very minor degree for originating live broadcasts in which Newburgh agencies or representatives participated."

See also Sanford A. Schafitz, 14 RR 852, 864-e.

28. Preparation and Planning and Program Proposals. Both applicants made contacts with representatives of local agencies and organizations for the purpose of discussing and formulating program proposals. Tidewater's contacts were largely with organizations and individuals residing at Smithfield, Isle of Wight County and adjoining counties on the west bank of the James River; and those of Fischer were primarily in Newport News and other parts of the Virginia Peninsula. Tidewater also made some contacts in Newport News; and, likewise, Fischer made some contacts in the Smithfield area. Tidewater also had the benefit of the knowledge and experience of its longtime resident stockholder, Gwaltney, as well as the knowledge of the area which Baker had gained from his somewhat extensive tours of duty at a nearby agricultural experimental station while he was on the faculty of VPI. Baker and Gwaltney, Tidewater principals, contacted various leaders in the Smithfield and surrounding area to review the program proposals and obtain suggestions, which were incorporated in the program descriptions. Baker, the principal executive of Tidewater, has devoted approximately one-third of his time, since the filing of the application, to the prosecution of the application and preparation for the hearing. This work included numerous trips to the Smithfield area, during which he discussed programming proposals and sought ideas and cooperation from local leaders. Fischer, the Newport News applicant, read local newspapers, listened ^{7/} to radio stations in Newport News and Hampton, and also visited a number of representatives of various organizations with the objective of determining the needs of such organizations. In addition, Fischer employed two persons, one a resident of Smithfield and the other a resident of Newport News, who also made some contacts for him. These persons were hired primarily for the purpose of determining whether the programming which Fischer had formulated was suited to the "local situation". Dr. Baker, on behalf of Tidewater, personally met with a substantial number of representatives of agencies in the Smithfield area and with a lesser number in Newport News to discuss program proposals. Both applicants have formulated and set forth adequate policy determinations.

^{7/} This listening must have been done largely on week ends, since he took annual leave from his full-time job as an attorney with the Defense Department, during the period he was engaged in the preparation for filing of both the Newport News and Winchester applications, only on March 31, plus three hours on April 13.

The programming proposed by each applicant is directed chiefly to the main community in which they propose to operate. While Fischer represents that his program proposals are directed to Newport News, Hampton and Williamsburg and the counties of York and James City, as well as to the counties of Isle of Wight and Surry, the major emphasis is actually upon Newport News and areas other than the Smithfield. Whereas, the major emphasis is placed upon the Smithfield, Isle of Wight and adjoining counties areas by Tidewater. While no preference is warranted on the factor of planning and preparation of the respective proposals, Tidewater is entitled to a preference because of the greater suitability of its proposed programming to the area found to have the greater need for the new facility for local self-expression.

Summation

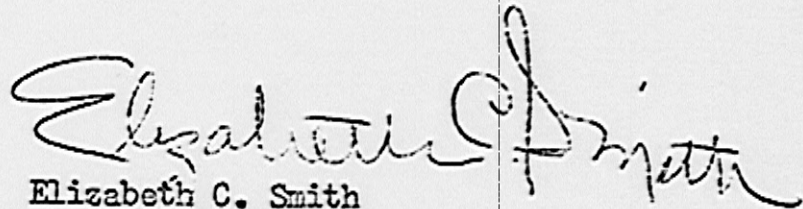
29. No preference has been awarded on the bases of diversification of media of mass communication, integration of ownership and management, or preparation and planning. Likewise, no preference is found to exist in connection with staffing, it having been concluded that each applicant's proposal is adequate in this respect. Preference has been awarded Tidewater on the factor of local residence, civic participation, diversification of business interests and broadcast experience, better location of main studio for local programs and suitability of program proposals to the Smithfield area. The preference with respect to broadcast experience is lessened to some degree due to failure of performance to measure up in all respects to promise in certain program categories.

30. Upon the local factors of residence, civic participation, integration of ownership and management, and diversification of business interests, all of which bear upon the applicant's knowledge of and sensitivity to the needs of the community to be served, Tidewater has made a good over-all showing. It has established decided preferences over Fischer in each of these areas of comparison, except on the factor of integration of ownership and management.

31. Thus, Tidewater is entitled to an over-all preference with respect to those factors bearing upon knowledge of and sensitivity to community needs and with the resulting greater probability of effectuation of program proposals, as well as suitability of program proposals to the area which has been found to have the greater need for the facility. No basis for preference exists with respect to staffing, integration of ownership and management, and diversification of media of mass communication.

32. On the basis of the foregoing facts and conclusions, it is ultimately concluded that the public interest, convenience and necessity would better be served by the grant of the application of Tidewater Broadcasting Company and the consequent denial of the Fischer application.

IT IS, ACCORDINGLY, ORDERED, This 5th day of July, 1961, that unless an appeal from this Initial Decision is taken by one of the parties, or the Commission reviews it on its own motion in accordance with the provisions of Section 1.153 of the Rules, the application of The Tidewater Broadcasting Company, Inc. for a construction permit for a new standard broadcast station to be operated on 940 kc with a power of 10 kw, daytime only, at Smithfield, Virginia, IS GRANTED, and that the application of Edwin R. Fischer for the same facilities to be operated at Newport News, Virginia, BE and the same is hereby DENIED.



Elizabeth C. Smith
Hearing Examiner
Federal Communications Commission

Released: July 11, 1961
and effective 50 days thereafter,
subject to the provisions of the
Rule cited in the ordering clause
above. Exceptions, if any, must
be filed within 30 days of the
release date unless an extension
is duly granted.



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R. 802

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

FCC 65D-16

66660

In re Applications of)

THE TIDEWATER BROADCASTING COMPANY, INC.)
Smithfield, Virginia)

DOCKET NO. 13243
File No. BP-12814

EDWIN R. FISCHER)
Newport News, Virginia)

DOCKET NO. 13248
File No. BP-13114

For Construction Permits)

Appearances

Robert M. Booth, Jr. and Joseph F. Hennessey, on behalf of The Tidewater Broadcasting Company, Inc.; William P. Bernton and E. Theodore Mallick, on behalf of Edwin R. Fischer; and James F. Marten, on behalf of the Broadcast Bureau of the Commission.

SUPPLEMENTAL INITIAL DECISION OF HEARING EXAMINER ELIZABETH C. SMITH

Preliminary Statement

1. This proceeding involves the mutually exclusive applications of The Tidewater Broadcasting Company, Inc. and Edwin R. Fischer, each for a standard broadcast station to operate on 940 kc, daytime only, with a power of 10 kw, at Smithfield, Virginia, and Newport News, Virginia, respectively. These applications were designated for hearing by order of the Commission released October 28, 1959, in a consolidated proceeding which then involved 31 applications for new or modified standard broadcast stations in Virginia, North Carolina, Maryland, Pennsylvania, Ohio, Indiana, Illinois, Michigan, Kentucky, Tennessee and Mississippi, to operate on 940 kc or channels immediately adjacent thereto. Amendments, dismissals, and grants without hearing, pursuant to petitions for reconsideration, of a number of applications made possible the severance of various applications into separate proceedings. The two instant applications were, by order dated March 9, 1961, severed from the other applications into the above-styled proceeding, hearings held, and an Initial Decision issued on July 5, 1961 (FCC 61D-102).

2. One of the applications designated for hearing with the Tidewater and Fischer applications and later severed and made a part of another group of applications was that of CABA Broadcasting Corporation, Docket No. 13245, which application was thereafter amended and became that of Radio Americana, Inc., requesting a construction permit for a new station at Baltimore, Maryland, Docket No. 13245, File No. BP-12962. Although some mutual interference would occur between Radio Americana's

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proposed operation and the mutually exclusive proposals of Tidewater and Fischer, such interference was not deemed to be of such character as to make the Baltimore application mutually exclusive with those involved in the instant proceeding. Pursuant to petition for reconsideration filed by Radio Americana, its application was severed and granted without further hearing by order of the Commission on banc, released January 9, 1961 (FCC 61-12). Subsequently, on August 3, 1961 (FCC 61-935), the Commission, on its own motion, issued an order staying further consideration of the Tidewater and Fischer applications "pending further review by the Commission". Further consideration of the Tidewater and Fischer applications was again stayed in a Memorandum Opinion and Order of the Commission involving the application of Radio Americana, Docket No. 13245 (Radio Americana, Inc., 21 RR 70-a, 70-g, paragraph 11). The stay orders did not suspend the filing of exceptions to the Initial Decision and such exceptions and replies thereto were filed on September 18, 1961 and October 24, 1961, respectively. A petition by Fischer requesting that the stay be lifted was denied by the Commission in an order released November 15, 1962 (FCC 62-1176).

3. No further action was taken in this proceeding until April 30, 1964, when the Commission issued an order (FCC 64-355-Corrected) granting a petition filed by Tidewater on March 16, 1964, which requested that the record be reopened and the following issue be added:

"To determine whether a grant of the proposal of the Tidewater Broadcasting Company, Incorporated, would be in contravention of the provisions of Section 73.35(a) of the Commission's Rules with respect to multiple ownership of standard broadcast stations, and, if so, whether circumstances exist which would justify waiver of the rule."

This order further provided that, "The stay is to remain in effect until further order of the Commission."

4. The necessity for the additional issue ^{1/} arises out of the common ownership and control of the Tidewater Broadcasting Company, applicant herein, and Accomack-Norhampton Broadcasting Company, the licensee of standard broadcast Station WESR, Tasley, Virginia, and became pertinent herein in connection with the increase in power of WESR. The common

^{1/} A Section 73.35 (multiple ownership) issue as to Tidewater was not included in the original order of designation and no request for such issue was made. However, subsequent to the adoption of the order of designation in the instant proceeding, Station WESR filed an application for construction permit to increase the power of Station WESR from its original operating power of 1 kw to 5 kw (File No. BP-15024).

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ownership and control as it existed at the time of the original hearing in the instant proceeding are set forth in paragraphs 28 and 29-b of the Findings of Fact of the Initial Decision. Since then, Charles F. Russell has died and his subscription to 10% of Tidewater stock has been assumed equally by Vernon H. Baker and C. Brooks Russell, thereby increasing their subscriptions from 40 to 45% each. The Tidewater application was amended to reflect this change pursuant to order released June 25, 1964 (FCC 64M-594). An examination of the WESR application for increased power showed an interference problem with co-channel Station WASA, Havre de Grace, Maryland, which had also filed an application for construction permit to increase its daytime power from 1 kw to 5 kw (File No. BP-15134). The applications of WESR (Docket No. 14945) and WASA (Docket No. 14946) were designated for hearing in a consolidated proceeding on February 4, 1963. On June 4, 1963, each of the applicants petitioned for leave to amend application, and by order, released June 12, 1963, the petitions for leave to amend were granted, the applications removed from the hearing docket and returned to the processing line. The Commission, on May 6, 1964, granted the applications of WESR and WASA, ^{2/} for increase of power to 5 kw for the respective stations.

5. In the meantime, the Commission, on July 16, 1962, issued a notice of proposed rule making (Docket No. 14711), inviting comments upon a proposal to amend the multiple ownership rule (Section 73.35) to prohibit overlap of the 1 millivolt per meter contours of commonly owned or controlled stations.

6. When it appeared that the WESR application would not be acted upon until a decision had been reached on Tidewater's application, which might not be forthcoming for some time because of the stay and related problems in connection with the application of Radio Americana, Tidewater, on March 16, 1964, petitioned to reopen the record in this proceeding and to add a multiple ownership issue relating to the common ownership and control of WESR and Tidewater. As already indicated, such petition was granted by the Commission and the multiple ownership issue was added by an order released April 30, 1964 (FCC 64-355-Corrected). The Commission thereupon granted the 5 kw application of WESR. ^{3/}

7. Subsequent to the prehearing conference in this proceeding held after remand in connection with the added issue, on May 13, 1964, the Commission, on June 9, 1964, released a report and order in the rule making proceeding (Docket No. 14711) amending Section 73.35 as proposed to prohibit overlap of the 1 mv/m contours of stations under common ownership and control (FCC 64-445; 2 RR 2d 1588). It is also noted that on

^{2/} In September of 1963, Accomack-Norhampton, licensee of WESR, had submitted to the Commission an engineering study showing overlap of the 2 and 0.5 mv/m contours of Tidewater's proposal and the 2 and 0.5 mv/m contours of the existing 1 kw and proposed 5 kw operation of WESR.

^{3/} Official notice taken of Commission action.

July 9, 1964, the Commission, in Public Notice Memo 53284, announced that the newly revised multiple ownership rule would not be applied in hearing cases where an Initial Decision had been issued prior to adoption of the new rule and that such cases would be decided under the old rules and policies. At the prehearing conference on September 21, 1964, the Hearing Examiner ruled that, under the special circumstances of this case, the new multiple ownership rule was to be applied in this proceeding and that evidence to support a waiver of the rule could be offered.

8. In a Memorandum Opinion and Order, released February 15, 1965, the proceeding in Docket No. 13245 was terminated and the application therein of Radio Americana, Inc. dismissed with prejudice and several new applications for new standard broadcast stations at Lebanon, Pennsylvania, and Catonsville, Maryland, respectively, all requesting authorization on 940 kc, 1 kw, were designated for consolidated hearing. Such Memorandum Opinion and Order further provided that in the event of a grant of any of the applications, the construction permit shall contain the condition that,

"Permittee shall accept any interference resulting from a grant of either of the applications of Edwin R. Fischer, File No. BP-13114 or The Tidewater Broadcasting Co., Inc., File No. BP-12814."

9. By order dated March 3, 1965 (FCC 65-161), the Commission, pursuant to petition of Fischer filed February 10, 1965, vacated the stay in this proceeding, reciting the fact that the application of Radio Americana had been dismissed and that any interference resulting from a grant of either of the applications in the instant proceeding must be accepted by any of the applicants in Lebanon, Pennsylvania, or Catonsville, Maryland, which might receive a grant.

10. Further prehearing conferences were held on May 13, 1964, and September 10 and 21, 1964, and evidentiary hearings were held on November 19 and 30, 1964, and the record closed on the last named date. By mesne orders, the dates for the filing of supplemental proposed findings of fact and conclusions of law and replies thereto were extended to February 5, 1965, and February 23, 1965, respectively. Supplemental proposed findings of fact and conclusions of law were filed on February 5, 1965, by both Tidewater Broadcasting and by the Broadcast Bureau; on February 10, 1965, Edwin R. Fischer filed comments on the proposed findings and conclusions; and on February 23, 1965, Tidewater Broadcasting filed its reply to the supplemental proposed findings of fact and conclusions of law. ⁴

⁴/ These pleadings are in compliance with the agreement of the parties made on the record on November 30, 1964, and approved by the Hearing Examiner.

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SUPPLEMENTAL FINDINGS OF FACT

11. The Tidewater applicant and the licensee of Station WESR are under common control. Tidewater seeks a construction permit for new daytime only Class II station for non-directional operation on 940 kc, with power of 10 kw, at Smithfield, Virginia, and Station WESR, at Tasley, Virginia, is a Class III station operating daytime only on 1330 kc, with power of 5 kw.

Engineering Considerations

The Tidewater Proposal - Smithfield, Virginia

12. The evidence concerning coverage of Tidewater's proposed station presented at the original hearing (paragraph 20 of the findings of fact of the Initial Decision) was based upon the 1950 U.S. Census. At the further hearing, Tidewater presented additional evidence based upon the 1960 U.S. Census and a minor revision of some contours. Based on an effective field (unattenuated at one mile) of 570 mv/m and conductivity values from Figure M-3 of the Rules, ^{5/} pertinent area and population data with respect to Tidewater's proposed operation at Smithfield are set forth in the following tabulation: ^{6/}

^{5/} Conductivity of Chesapeake Bay was assumed to be 40 mm/m above and 5,000 mm/m below a line drawn west from Cambridge, Maryland. For the James, Rappahannock and York Rivers, a conductivity of 40 mm/m was assumed.

^{6/} The parties stipulated that there would be no significant difference in the coverage proposals of Tidewater and Fischer. The findings in the tabulation are thus equally applicable to Fischer's proposed operation at Newport News.

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<u>0.5 mv/m Contour</u>	<u>Population 7/</u>	<u>Area (sq. mi.) 8/</u>
North Carolina	35,392 (3.48%)	1,504 (22.84%)
Maryland (East of Chesapeake Bay)	16,727 (1.65%)	476 (7.23%)
Virginia (East of Chesapeake Bay)	37,741 (3.71%)	510 (7.75%)
Virginia (South and West of Chesapeake Bay) 9/	926,378 (91.16%)	4,094 (62.18%)
Chesapeake Bay	-	2,139
Interference-free Total	1,016,238 (100.0%)	6,584 (100.0%)

13. Since, at the time the further hearing was held, the Commission had imposed a stay as to the Initial Decision in this proceeding in connection with the setting aside of its grant of the Radio Americana, Inc. application (Docket No. 13245) for a new co-channel station at Baltimore, Maryland, it was agreed that the Supplemental Initial Decision would be stayed consistent with the Commission's stay of the original Initial Decision. The Commission later accepted for filing three additional applications in the Baltimore-Catonsville, Maryland area. 10/ Subsequently, the Radio Americana application was dismissed (Memorandum Opinion and Order released February 15, 1965; FCC 65-102). 11/ In view of this action of the Commission, it is unnecessary to make findings with respect to the effect of the proposed Radio Americana operation upon the Tidewater proposal. The three remaining proposals would cause objectionable interference to Tidewater's proposal to the following extent:

7/ Based upon 1960 U.S. Census, with cities having populations of 2,500 or more located between the 0.5 and 2 mv/m contours excluded. Percentages are based upon total interference-free population.

8/ Water areas excluded. Percentages are based upon total interference-free land area.

9/ Because of first adjacent channel interference from Station WXGI, Richmond, Virginia, 5,924 persons in an area of 368 square miles would not receive primary service from the proposed operation.

10/ Several applications were also accepted for Lebanon, Pennsylvania. However, no objectionable interference would be experienced between these Lebanon applications and Tidewater.

11/ Petition for reconsideration of such action was filed March 17, 1965, by Radio Americana and is now pending before the Commission.

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(a) From either the application of Catonsville Broadcasting Company (File No. BP-16105, Docket No. 15838) or that of Radio Catonsville (File No. BP-16106, Docket No. 15839) at Catonsville:

	<u>Population</u>	<u>Land Area (sq. mi.)</u>
West of Chesapeake Bay	14,847	256
East of Chesapeake Bay	30,709	686
Total Interference	45,556	942
Smithfield Interference-free	970,682	5,642

(b) From application of Commercial Radio Institute (File No. BP-16107, Docket No. 15840) at Catonsville:

	<u>Population</u>	<u>Land Area (sq. mi.)</u>
West of Chesapeake Bay	8,368	223
East of Chesapeake Bay	32,517	747
Total Interference	40,885	970
Smithfield Interference-free	975,353	5,614

Station WESR, Tasley, Virginia

14. The present 5-kw power operation of Station WESR at Tasley, Virginia, receives objectionable interference from Stations WASA, Havre de Grace, Maryland, and WUSM, Havelak, North Carolina.

15. Based on an effective field (unattenuated at one mile) of 450 mv/m, and ground conductivity values based upon measurements submitted by Stations WESR and WASA in support of their applications for power increase to 5 kw and values from Figure M-3 of the Rules where the measurements were not applicable, ^{12/} the pertinent area and population data with respect to WESR's operation are set forth in the following tabulation:

^{12/} See footnote 5, above, for conductivities of bodies of water.

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<u>0.5 mv/m Contour</u>	<u>Population</u> ^{13/}	<u>Area (sq. mi.)</u> ^{14/}
North Carolina		
Interference-free ^{15/}	2,871 (2.38%)	65 (3.61%)
Maryland (West of Chesapeake Bay) ^{16/}	12,102 (10.03%)	364 (20.23%)
Maryland (East of Chesapeake Bay) ^{17/}	15,696 (13.02%)	58 (3.22%)
Virginia (West of Chesapeake Bay)	50,251 (41.65%)	581 (32.30%)
Virginia (East of Chesapeake Bay)	39,718 (32.92%)	731 (40.63%)
Chesapeake Bay	-	2,081
Interference-free Total	120,638 (100.0%)	1,799 (40.63%)

The service in North Carolina is in a long, narrow area along the shore of the Atlantic Ocean. Except for this area of approximately 64 square miles, no areas south of the Chesapeake Bay receive service from Station WESR.

Overlap Considerations

16. Overlap of the service areas is occasioned in large measure by the substantial salt-water areas of high conductivity that intervene between Smithfield and Tasley. Finger-like projections of the respective field strength contours over water areas cause much of the overlap to fall in the Bay.

17. The approximate minimum and maximum distances from Tidewater's proposed transmitter site at Smithfield to various contours would be as follows:

^{13/} Based upon 1960 U.S. Census, with cities having populations of 2,500 or more located between the 0.5 and 2 mv/m contours excluded. Percentages are based upon total interference-free population.

^{14/} Water areas excluded. Percentages are based upon total interference-free land area.

^{15/} Interference from WUSM causes interference to 2,096 persons in an area of 120 square miles.

^{16/} Interference from WASA causes interference to 3,937 persons in an area of 58 square miles.

^{17/} Interference from WASA causes interference to 4,709 persons in an area of 86 square miles.

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<u>Contour</u>	<u>Minimum (miles)</u>	<u>Maximum (miles)</u>
2.0 mv/m	22	87
1.0 mv/m	29.5	96
0.5 mv/m	41.5	105
Interference-free if any of 3 Catonsville applications granted	35	94-96
Interference-free if all applications denied	35	105

The airline distance between the transmitter sites of WESR and the proposed Smithfield station is 69 miles, of which approximately 30 miles is over the waters of Chesapeake Bay. A signal of less than 1 mv/m but more than 0.5 mv/m would be placed over Tasley by Tidewater. However, if any of the applications in the Catonsville area should be granted, Tasley would lie within the interference area. The approximate minimum and maximum distances from WESR's transmitter site at Tasley to various contours are as follows:

<u>Contour</u>	<u>Minimum (miles)</u>	<u>Maximum (miles)</u>
2.0 mv/m	12.5	58
1.0 mv/m	19	61
Interference-free	26	80

The wide variations in the distances to the various contours arise from the presence of Chesapeake Bay and numerous inlets and tributaries close to the transmitter sites at both Tasley and Smithfield. The conductivity varies from a low of 2 and 4 mm/m over the land to a high of 5,000 mm/m over Chesapeake Bay.

18. The extent of overlap of the 1 mv/m and interference-free contours of WESR and the proposed Smithfield station depends, in part, on the action to be taken on the pending co-channel applications in the Catonsville area.

(a) If none of the pending co-channel applications in the Catonsville area are granted, the following areas and populations would receive service from both WESR and Tidewater's proposed station at Smithfield:

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<u>1 mv/m Contours</u>	<u>Population</u>	<u>Land Area (sq. mi.)</u>
West of Chesapeake Bay	4,885	64
East of Chesapeake Bay (Virginia)	12,514	224
East of Chesapeake Bay (Maryland)	5,547	123
Total 1 mv/m overlap	22,946	411

Interference-free Contours
(0.5 mv/m)

West of Chesapeake Bay	22,513	220
East of Chesapeake Bay (Virginia)	24,805	491
East of Chesapeake Bay (Maryland)	11,007	294
Total interference-free overlap	58,325	1,005

The overlap of the interference-free areas, expressed in percentages of the interference-free populations and areas for both WESR and the proposed Smithfield station, would be as follows:

	<u>Smithfield</u>		<u>WESR</u>	
	<u>Population</u>	<u>Area</u>	<u>Population</u>	<u>Area</u>
West Chesapeake Bay	2.22%	3.34%	18.67%	12.23%
East Chesapeake Bay	3.52%	11.92%	29.69%	43.64%
Total	5.74%	15.26%	48.36%	55.87%

(b) If either the Catonsville Broadcasting Company (BP-16105) application or the Radio Catonsville (BP-16106) application for Catonsville is granted, the areas and populations would be as follows:

<u>1 mv/m Contours</u>	<u>Population</u>	<u>Land Area (sq. mi.)</u>
West of Bay	4,885	59
East of Bay (Virginia)	1,574	31
East of Bay (Maryland)	4,088	51
Total 1 mv/m overlap	10,547	141

Interference-free Contours

West of Bay	19,149	261
East of Bay (Virginia)	1,886	46
East of Bay (Maryland)	4,556	69
Total interference-free overlap	25,591	376

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The overlap of the interference-free areas, expressed in percentages, would be as follows:

	<u>Smithfield</u>		<u>WESR</u>	
	<u>Population</u>	<u>Area</u>	<u>Population</u>	<u>Area</u>
West of Bay	1.97%	4.63%	15.87%	14.51%
East of Bay	0.66%	2.04%	5.34%	6.39%
Total	2.63%	6.67%	21.21%	20.90%

(c) If the application of Commercial Radio Institute for Catonsville should be granted, the areas and populations would be as follows:

<u>1 mv/m Contours</u>	<u>Population</u>	<u>Land Area (sq. mi.)</u>
West of Bay	4,885	90
East of Bay (Virginia)	1,344	28
East of Bay (Maryland)	4,038	38
Total 1 mv/m overlap	10,317	156

<u>Interference-free Contours</u>		
West of Bay	20,153	295
East of Bay (Virginia)	1,426	42
East of Bay (Maryland)	4,556	64
Total interference-free overlap	26,135	401

The overlap of the interference-free areas, expressed in percentages, would be as follows:

	<u>Smithfield</u>		<u>WESR</u>	
	<u>Population</u>	<u>Area</u>	<u>Population</u>	<u>Area</u>
West of Bay	2.07%	5.23%	16.71%	16.40%
East of Bay	0.62%	1.89%	4.96%	5.89%
Total	2.69%	7.12%	21.67%	22.29%

19. If all of the applications in the Catonsville area are denied, the areas within the interference-free contours of both WESR and the proposed Smithfield station would receive a minimum of 7 and a maximum of 17 other services. If any of such applications should be granted, the minimum and maximum of other services would be 7 and 18, respectively.

20. The 2.0 mv/a contours of Tidewater and Station WESR would also overlap. This would include areas in the Chesapeake Bay and rural land areas adjoining the southern portion of the bay. These land areas would be very small in extent and would lie immediately adjacent to the shore in Maryland and Virginia.

Character of the Areas

21. Detailed findings of fact concerning Smithfield and the adjacent areas are set forth in paragraphs 9 to 13, inclusive, of the Initial Decision and need not be repeated here other than to note that Smithfield lies to the south of Chesapeake Bay and that agriculture in the area is devoted primarily to raising peanuts, corn, soybeans and livestock, largely hogs.

22. As noted in paragraph 9 of the findings of fact of the Initial Decision, the peninsula north of the outlet to the Atlantic Ocean and between the ocean and Chesapeake Bay is known as the "Eastern Shore". An unincorporated area known as Tasley, which lies between and contiguous to the incorporated municipalities of Onancock, Accomac and Onley, is located on the narrow peninsula (10 to 12 miles wide) some 44 airline miles north of the outlet to the ocean and some 16 airline miles south of the Maryland-Virginia boundary. The center of Tasley lies about 1.5 miles west of the western boundary of Accomac, 1.7 miles east of the eastern boundary of Onancock, and 1.0 miles north of the northern boundary of Onley. The population of the incorporated municipalities, according to the 1960 U.S. Census, is as follows: Onancock, 1,759; Accomac, 414; and Onley, 415. The population of the unincorporated area of Tasley was determined to be 742 by counting the number of residential units in the area served by the Tasley Post Office and multiplying by the average number of residents per household for Accomac County as shown in the 1960 Census. A single school system serves the entire area, with high schools and grade schools located in both Onancock and Accomac. Students from throughout the area attend the schools. Two volunteer fire departments, one in Tasley and one in Onancock, cooperate in providing fire protection to the entire area including Accomac and Onley and are dispatched by the telephone operator in Onancock. A single telephone exchange, located in Onancock, serves the entire area. Police protection is provided in Onancock by a department consisting of two fulltime and two parttime men. Protection to other areas is provided by the sheriff's office which is located in Accomac, and by the Virginia State Police, which maintains an office about 3.5 miles south southwest of Tasley. The only Catholic church in the area, St. Peter's, is located immediately north of Onley. Methodist churches are located in Tasley, Onancock, Onley and Accomac; Baptist churches are located in Onancock, Onley and Accomac; and Episcopal and

Presbyterian churches are located in Onancock and Accomac. Accomac is the county seat of Accomack County and the usual county offices are located there, as well as a State Highway Office. The only municipal water and sewage systems are located in Onancock. There are two super-markets in the area, one in Onancock and one in Tasley; the only Ford dealer is in Tasley; the only Chevrolet dealer is in Onancock; the only Pontiac dealer is in Tasley; and the only Chrysler-Plymouth dealer is in Accomac.

23. The Eastern Shore peninsula has been the subject of studies by the Division of Industrial Development and Planning of the Governor's Office, Commonwealth of Virginia, and the Area Redevelopment Administration of the United States Department of Commerce. The peninsula is divided into two counties, Accomack to the north and Northampton to the south. Accomack County is about twice as large as Northampton County, both in area and population. The 1960 U.S. Census gives the populations as 30,635 for Accomack County and 16,966 for Northampton County. The entire peninsula, about 70 miles long, is mostly flat land, with some low-lying hills on the Chesapeake Bay side. A string of off-shore island beaches lie along the sea-side of the peninsula and are separated from the mainland by several miles of marshland and open bays. Of the peninsula's seven hundred square miles of land area, almost one-third is made up of commercial forests. Most of the remaining land is used for growing soy beans, Irish potatoes, string beans, tomatoes, and various other vegetable crops. Historically, one of the significant forces influencing the economic, political, and social structures of the Eastern Shore has been the relative isolation of the area. Until recently, the only connection between the peninsula and the Norfolk area to the south was by ferry across the outlet of Chesapeake Bay. In 1964, the Chesapeake Bay Bridge and Tunnel was opened for vehicular traffic with rates varying from a minimum of \$4.00 for a passenger car with driver to \$22.00 for large vehicles. For some years, Accomack and Northampton Counties were members of the Tidewater Virginia Development Council, as were the five counties which make up the Tidewater area, Isle of Wight, Surry, Sussex, Nansemond and Southampton. In 1962, however, Accomack and Northampton Counties withdrew from the Council because of the lack of common interests of the Eastern Shore with the area to the south. The only broadcast station on the Eastern Shore is WESR at Tasley.

CONCLUSIONS

1. This proceeding involves the mutually exclusive applications of The Tidewater Broadcasting Company, Incorporated, and Edwin R. Fischer, requesting construction permits for new broadcast stations on 940 kc at Smithfield, Virginia and Newport News, Virginia, respectively. The original Initial Decision, which was released on July 11, 1961, considers and disposes of all issues except the one added in the order ^{1/} by the Commission in which the record was reopened, the issues enlarged and the proceeding remanded. The added issue ^{2/} deals with the question of overlap between the proposed Smithfield station and Station WESR at Tasley, Virginia, which are under common control, and requires a determination of whether a grant of the Tidewater proposal would be in contravention of Section 73.35(a) ^{3/} of the Commission's Rules; and, if so, whether circumstances exist which would justify a waiver of the Rule.

2. A resume of the history of this proceeding and the power increase of Station WESR, as well as the history of the 1 mv/m overlap Rule as now embodied in Section 73.35(a) and its chronological relationship to the Tidewater proposal, is necessary to a proper resolution of this added issue. In this connection consideration must be given to the question of whether such Rule is applicable at all under the circumstances here existing; and, if so, whether the instant facts and circumstances justify a waiver of the Rule.

3. The evidence clearly shows that the Tidewater applicant and the licensee of Station WESR are under such common control as is contemplated by Section 73.35(a) of the Rules. The evidence also shows that there would be an overlap of the 1 mv/m contours of the Tidewater proposal and Station WESR.

^{1/} Released April 30, 1964.

^{2/} See page 2, supra, for text of such issue.

^{3/} Section 73.35 reads, in pertinent part, as follows:

"Multiple Ownership. No license for a standard broadcast station shall be granted to any party (including all parties under common control) if:

"(a) Such party directly or indirectly owns, operates, or controls one or more standard broadcast stations and the grant of such license will result in any overlap of the predicted or measured 1 mv/m groundwave contours of the existing and proposed stations, computed in accordance with Section 73.183 or Section 73.186;"

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4. At least two new facts now exist which did not exist at the time of the issuance of the Initial Decision, on July 5, 1961, in this proceeding: (1) the amendment of Section 73.35(a), which was adopted on May 20, 1964 (released June 9, 1964, and effective July 16, 1964); and (2) the increase in power granted to Station WESR May 6, 1964.

5. A major complication affecting the expeditious final determination of this proceeding was the stay of the Initial Decision herein, effected by an order of the Commission, released August 3, 1961, in connection with the co-channel application of Radio Americana at Baltimore, Maryland, and competing applications at Catonsville, Maryland. Tidewater and Fischer, the applicants in the instant proceeding, were innocent bystanders in the complicated and litigious proceeding involving the application of Radio Americana, which was the basis of the stay of consideration of this proceeding for more than three and a half years. ^{4/} During this interval the two events above referred to, and of major importance to this proceeding, occurred, i.e., increase in power of Station WESR and adoption of the new overlap Rule, in that chronological order.

6. It is noted that at the time the record was reopened - as well as at the time the power increase to WESR was granted - and the issue added which referred to "Section 73.35(a)", Section 73.35(a) read as follows:

"Multiple ownership. No license for a standard broadcast station shall be granted to any party (including all parties under common control) if:

"(a) Such party directly or indirectly owns, operates or controls another standard broadcast station, a substantial portion of whose primary service area would receive primary service from the station in question, except upon a showing that public interest convenience and necessity will be served through such multiple ownership situation;"

^{4/} The order of stay was released August 3, 1961, and the stay was lifted by order released March 4, 1965, after the dismissal of the Radio Americana application and the imposition of a condition that, in the event of a grant to any of the named other applicants whose applications are similarly situated in some respects to that of the application of Radio Americana, but filed years later, such applicants must accept whatever interference would be caused by a grant of either the Tidewater or the Fischer proposal involved in this proceeding. Whether the Radio Americana saga is, even now, actually at an end may be debatable, since there is now pending before the Commission a petition for reconsideration of the action dismissing the Radio Americana application.

A. 64
R. 817

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The present Rule was not adopted until May 20, 1964, did not become public knowledge until June 9, 1964, and did not become effective until July 16, 1964.

7. While prior to amendment of Section 73.35, Section 73.35(a) was couched in terms prohibiting parties from owning, controlling, or operating standard broadcast stations if their primary service contours overlapped substantially, the new amendment bars overlap of the predicted 1 mv/m service contours between commonly owned or controlled standard broadcast stations. In the Report and Order adopting the present Rule (Docket No. 14711; FCC 64-445; 2 RR 2d, 1588, 1603), the Commission stated that,

"The new rules will be effective as to pending applications, including hearing cases, as well as new applications."

In the Report and Order, supra, page 1602, reference was also made to comments raising questions as to situations where the overlap might occur over water or in a desert. In this connection the Commission said,

"For the most part, these hypothetical problems are highly speculative and, to the extent that one or more may ever materialize, are subject to individual examination upon requests for waiver of the rule."

Another important action of the Commission in connection with the applicability of the Rule here under consideration is contained in a Public Notice, ^{5/} entitled "Applicability of New Broadcast 'Duopoly' Rules", adopted July 8, 1964, and released July 9, 1964, in which it was announced by the Commission that,

"The Commission today decided that applications in hearing status concerning which a Hearing Examiner had released an Initial Decision prior to June 9, 1964, will be treated as an exception to this policy and will be disposed of under the old overlap rules in effect prior to July 16, 1964."

8. The question of the applicability of the present Section 73.35(a) of the Rules was raised during the further hearing in the instant proceeding and was argued at some length. The Hearing Examiner, after observing that the question was a close one, ruled that Tidewater should adduce evidence relative to the overlap matter, so that this proceeding

^{5/} While this was denominated "Public Notice", its text clearly shows that it was, in fact, a formal action of the Commission expressed in the exact language of the Public Notice.

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would not have to be remanded again for the taking of further evidence, in the event that some higher forum should hold the 1964 amendment applicable to the Tidewater proposal.

9. Separate and apart from the close question of the applicability of the present Rule to this proceeding, particularly in view of the Public Notice of the Commission of July 9, 1964, factors exist which support the request for a waiver of the Rule. One is the fact that a major portion of the overlap occurs in Chesapeake Bay and over uninhabited marsh lands immediately adjacent thereto, and the other is the separate and distinct relationship of the communities, separated as they are by bodies of water. This would appear to be one of those situations to which the Commission had reference in the Report and Order adopting the Rule, supra, as being a proper matter for individual examination upon request for waiver of the Rule.

10. On the other side of the coin is the fact that, subsequent to the issuance of the Initial Decision but prior to the adoption of the new Rule, the principal owners of Tidewater and Station WESR requested, and were granted, increase in power for Station WESR, which, in turn, created the 1 mv/m overlap question and, as a concomitant action, Tidewater petitioned to reopen the instant proceeding and to have the new issue now under consideration added. The petition to reopen and add issue was filed by Tidewater on March 16, 1964, and was acted on by the Commission on April 30, 1964, at a time when the request for increase in power at WESR was pending. In fact, the WESR power increase application was granted on May 6, 1964, about one week after this record was reopened and the issue added. It must be remembered, however, that all of this took place prior to the adoption of the amendment ^{6/} and, particularly, prior to the Commission's interpretative Public Notice of July 9, 1964, in which it was unequivocally stated that the new Rule would not apply to applications in which Initial Decisions had already been issued.

11. After a careful consideration of the entire record in this proceeding, particularly as reflected in the foregoing findings, it is concluded that Tidewater Broadcasting has met the criteria of Section 73.35(a) effective at the time the record was reopened and the new issue added. As has already been indicated, there is serious doubt as to whether the amendment to Section 73.35(a), adopted in late May, released in early June, and effective July 16, 1964, is applicable to the Tidewater proposal, especially in view of the formal action of the commission as shown in the Public Notice adopted July 8, 1964, and released July 9, 1964; and if it should later be held that such amendment

^{6/} Notice of Proposed Rule Making does not, of course, constitute adoption action and, furthermore, it is well established that numerous proposed rules have not been finally adopted.

A. 66
R. 819

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is applicable, it is believed that Tidewater has met the burden necessary for a waiver of such Rule, and the evidence developed at the further hearing in connection with the now issue is not sufficient to disturb the disposition of this proceeding made in the Initial Decision, released July 11, 1961.

IT IS, THEREFORE, ORDERED, This 16th day of April, 1965, that the ordering paragraph contained in such Initial Decision is hereby reaffirmed.



Elizabeth C. Smith
Hearing Examiner
Federal Communications Commission

Released: April 19, 1965
and effective 50 days thereafter, subject to the provisions of the Rule cited in the ordering clause above. Exceptions, if any, must be filed within 30 days of the release date unless an extension is duly granted.

A. 67
R. 861

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

FCC 66-61
77647

In re Applications of)

THE TIDEWATER BROADCASTING COMPANY,)
INCORPORATED)
Smithfield, Virginia)

DOCKET NO. 13243
File No. BP-12814

EDWIN R. FISCHER)
Newport News, Virginia)

DOCKET NO. 13248
File No. BP-13114

For Construction Permits)

MEMORANDUM OPINION AND ORDER

By the Commission: Commissioner Bartley dissenting and issuing a
statement; Commissioner Cox not participating.

1. This proceeding involves the applications of The Tidewater Broadcasting Company, Incorporated (Tidewater) and Edwin R. Fischer (Fischer) to establish new standard broadcast stations at Smithfield and Newport News, Virginia, respectively, each to operate as a Class II station on the frequency of 940 kc, with a power of 10 kw, daytime only.

2. An Initial Decision, FCC 61D-102, released July 11, 1961 and a Supplemental Initial Decision, FCC 65D-16, released April 19, 1965, proposed grant of the Tidewater application for Smithfield. Oral argument on exceptions to the Initial and Supplemental Decisions was heard before the Commission en banc on December 9, 1965.

3. Although, as will appear hereinafter, this proceeding must be remanded for further hearing in light of our new policy on Section 307(b) considerations,^{1/} we think that we should resolve at this juncture an outstanding multiple ownership question so that the parties hereto may be aware of the Commission's disposition of this matter. The multiple ownership question treated in the Supplemental Initial Decision is whether grant of the Tidewater proposal would be contrary to the provisions of Section 73.35(a) of the Commission's Rules and whether circumstances exist which would justify waiver of the Rule. The Examiner concluded, among other things, that the provisions of Section 73.35(a) should be waived.

1/ Policy Statement on Section 307(b) Considerations for Standard Broadcast Facilities Involving Suburban Communities (FCC 65-1153). released December 27, 1965.

Her findings and conclusions in the Supplemental Initial Decision are adopted, except for the ordering clause. Fischer exceptions to the Supplemental Initial Decision Nos. 1-4 inclusive, 6-9 inclusive, and No. 10 to the extent that it disagrees with the Examiner's conclusion to waive the multiple ownership rule, are denied. Exception No. 1 of the Chief, Broadcast Bureau and Tidewater exceptions Nos. 1 and 2 to the Supplemental Initial Decision are also denied.

4. After the inclusion on April 30, 1964 of the multiple ownership issue in the proceeding, the Commission issued its Report and Order (Docket No. 14711, FCC 64-445, released June 9, 1964) amending its multiple ownership rules. Although the Commission later released a Public Notice (FCC 64-636, July 9, 1964) relaxing the applicability of the new rules to applications which were in hearing status and which were the subjects of initial decisions prior to June 9, 1964, the relaxation did not apply to the instant case because the 1961 Initial Decision did not consider the multiple ownership question. The Examiner allowed an evidentiary showing under both the old and new multiple ownership rules, and in her Supplemental Initial Decision made findings under both. While we are of the view that the new rules with their more stringent requirements apply to this proceeding, we agree with the Examiner's conclusion that waiver of these rules (Section 73.35(a)) is warranted. The overlap of the 1 mv/m contour of the Tidewater proposal for Smithfield and that of Station WESR, Tasley, Virginia, in which two of Tidewater's principals own interests, will occur mainly over a large body of water and adjacent, uninhabited marsh lands. The overlap was occasioned in large measure by the substantial salt water paths of high conductivity which occur between Smithfield and Tasley. Moreover, separated as they are by large bodies of water, Smithfield and Tasley are clearly separate and distinct communities. Thus, we hold that the overlap of 1 mv/m contours does not bar a grant of the Tidewater application.

5. Our examination of the Tidewater and Fischer applications discloses that both applicants' proposed 5 mv/m daytime contours will penetrate the geographic boundaries of at least one other community of over 50,000 persons and with a population at least twice as large as that of each applicant's specified station location. Accordingly, we are persuaded for the reasons enunciated in our Policy Statement, *supra*, that a determination should be made in the proceeding whether each of these suburban proposals will realistically serve its own specified station location or some other larger community. We shall therefore revise the issues in this proceeding so that, in addition to the usual 307(b) evidence concerning the independence of a suburban community from its central city (much of which has already been adduced), the parties may fully explore all matters relating to the need for each of these proposals. Thus, each of the applicants will be expected to show the extent to which it has ascertained that its specified station location has separate and distinct programming needs, the extent to which these needs are not being met by existing standard broadcast stations,

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and the extent to which its program proposals will meet these needs. Additionally, each of the applicants will be expected to adduce evidence as to whether the projected sources of advertising revenues from within its specified station location are adequate to support its proposals as compared with its projected sources from all other areas.

6. An applicant who fails to establish that it will realistically serve its specified station location under the programming and revenues issue will be deemed to propose to serve the most populous community whose geographic boundaries are penetrated by its 5 mv/m daytime contour, unless the evidence establishes that it will realistically serve a third community whose boundaries are penetrated by its 5 mv/m daytime contour. 2/ Accordingly, an issue will also be added to determine whether these applicants meet all of the technical provisions of our Rules, including Sections 73.30, 73.31, and 73.188(b)(1) and (2), for a station assigned to the appropriate larger community. Finally, the burden of proof with respect to these additional issues will be upon the individual applicants in each instance. 3/

ACCORDINGLY, IT IS ORDERED, This 19th day of January , 1966, that this proceeding IS REMANDED to Hearing Examiner Elizabeth C. Smith for further hearing and for preparation of a Supplemental Initial Decision consistent with this Memorandum Opinion and Order; and

IT IS FURTHER ORDERED, That the issues in this proceeding ARE HEREBY ENLARGED as follows:

- (a) To determine whether each of the proposals will realistically provide a local transmission facility for its specified station location or for another larger community, in light of all of the relevant evidence, including, but not necessarily limited to, the showing with respect to:

2/ See paragraph 11 and especially footnote 1 appended thereto of our Policy Statement, supra, for the effect of such service to a third community.

3/ The Commission notes that Fischer in a letter of January 3, 1966 has alleged, on the basis of information set forth therein, that grant of his proposal is consonant with our Policy Statement, supra, and remand is unnecessary. However, Fischer's contentions are premised upon his view that the Tidewater application must be denied because of the multiple ownership question, and that since he is a "fully qualified applicant all Section 307(b) considerations would normally be rendered moot; and the Fischer application for Newport News would be automatically granted." Since we hold that Tidewater is not disqualified under the multiple ownership issue, and that waiver of the provisions of Section 73.35(a) is warranted, we are of the view that remand and further hearing is required as to both the Tidewater and Fischer proposals.

A. 70
R. 864

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- (1) The extent to which each specified station location has been ascertained by each applicant to have separate and distinct programming needs;
 - (2) The extent to which the needs of each specified station location are being met by existing standard broadcast stations;
 - (3) The extent to which each applicant's program proposal will meet the specific, unsatisfied programming needs of its specified station location; and
 - (4) The extent to which the projected sources of each applicant's advertising revenues within its specified station location are adequate to support its proposal, as compared with its projected sources from all other areas.
- (b) To determine, in the event that it is concluded pursuant to the foregoing issue (a) that one or both of the proposals will not realistically provide a local transmission service for its specified station location, whether each such proposal meets all of the technical provisions of the Rules, including Sections 73.30, 73.31, and 73.188(b)(1) and (2), for standard broadcast stations assigned to the most populous community for which it is determined that the proposal will realistically provide a local transmission service.

FEDERAL COMMUNICATIONS COMMISSION *

Ben F. Waple
Secretary

Released: January 20, 1966

See attached Dissenting Statement of Commissioner Bartley

DISSENTING STATEMENT OF COMMISSIONER ROBERT T. BARTLEY

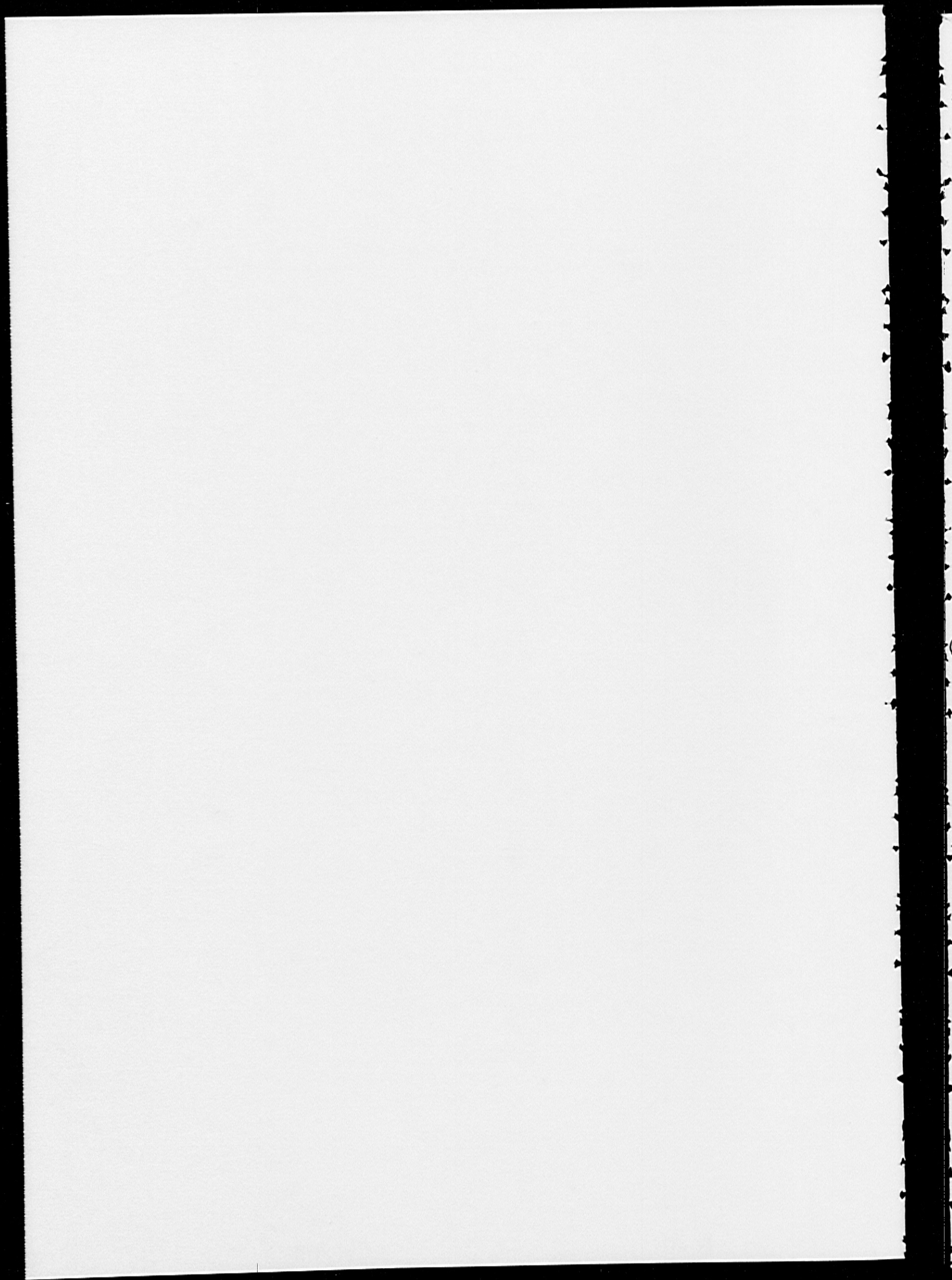
I dissent to the remand.

Tidewater is in violation of Section 73.35(a) of our Rules on multiple ownership, and, in my opinion, justification for a waiver has not been shown.

As stated by the Broadcast Bureau in its exceptions, a waiver is not warranted where, as here, there is no demonstration of a compelling public need. Dover Broadcasting Company, Inc. FCC 65-404, May 13, 1965.

In the remand order, a waiver rests on the overlap occurring over a large body of water and uninhabited marshland; and on Smithfield and Tasley being separate and distinct communities. However, substantial overlap occurs also over inhabited land, affecting 48% of the population in WESR's interference-free contour and 5.7% in Tidewater's. Moreover, WESR's being the only station in Tasley and on the Virginia Eastern Shore militates against a waiver.

With the disqualification of Tidewater under Section 73.35(a), there is no need for Fischer to submit further evidence pursuant to our 307(b) Policy Statement, and I would grant the Fischer proposal.



Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

FCC 67D-1
94457

In re Applications of)	
)	
THE TIDEWATER BROADCASTING COMPANY,)	DOCKET NO. 13243
INCORPORATED)	File No. BP-12814
Smithfield, Virginia)	
)	
EDWIN R. FISCHER)	DOCKET NO. 13248
Newport News, Virginia)	File No. BP-13114
)	
For Construction Permits)	

Appearances

Robert M. Booth, Jr. on behalf of The Tidewater Broadcasting Company, Incorporated; William P. Bernton and E. Theodore Mallvck on behalf of Edwin R. Fischer; Larry M. Berkow and Ernest Nash on behalf of the Broadcast Bureau of the Commission.

SECOND SUPPLEMENTAL INITIAL DECISION OF HEARING EXAMINER
ELIZABETH C. SMITH

Preliminary Statement

1. In view of the protracted length of this proceeding, a brief resume of its history will be helpful. The two above-styled applications were filed in February and May 1959, respectively, and were originally designated for hearing on October 28, 1959 -- more than seven years ago. The October 1959 Order of Designation also set for hearing some 30 other applications for the same or similar facilities in other areas, along with the two instant ones. By reason of mesne severances and grants of certain of the applications, and amendments or dismissals of others, the original multi-party proceeding was severed into a number of smaller proceedings, one of which is here under consideration.

2. The hearing with respect to the originally specified issues relating to the two instant applications was held and the record thereon was closed by order released March 10, 1961. Initial Decision was thereafter issued on July 5, 1961 (FCC 61D-102). (The text of the issues relating to Tidewater and Fischer specified in the original Order of Designation of October 1959 is set forth on pages 2, 3 and 4 of such Initial Decision and the findings and conclusions based upon the hearing record with respect thereto, as set forth in such Initial Decision, are reaffirmed herein.)

A. 74
R. 1340

- 2 -

3. Subsequently, on August 3, 1961 (FCC 61-935), the Commission en banc, on its own motion, issued an order staying consideration of the two instant applications "pending further review by the Commission." On September 13, 1961, consideration of the Tidewater and Fischer applications was again stayed by the Commission en banc (in Memorandum Opinion and Order involving the application of Radio Americana, Inc., Docket No. 13245, FCC 61-1100). Petition to lift the stay was denied by the Commission on November 15, 1962 (FCC 62-1176).

4. No further action was taken in this proceeding until April 30, 1964, when the Commission issued an order (FCC 64-355 corrected) which reopened the record and directed that a further hearing be held on a newly specified issue. ^{1/} The order of remand also provided that "The stay is to remain in effect until further order of the Commission."

5. The hearing with respect to the new issue specified in the first remand order (FCC 64-355) was held on various dates in May, September, and November, 1964 and the record closed on November 30, 1964. The Supplemental Initial Decision with respect to the additional issue specified in the order of remand, and based upon the evidence adduced at the further hearing, was issued April 19, 1965 (FCC 65 D-16). Thereafter, oral argument on exceptions to both the Initial Decision and the Supplemental Initial Decision was heard before the Commission en banc on December 9, 1965.

6. On January 20, 1966, a Memorandum Opinion and Order of the Commission was released in which the findings and conclusions of the Supplemental Initial Decision were adopted by the Commission, except for the ordering clause, and it was specifically held that the overlap of 1 mv/m contours does not bar a grant of the Tidewater application. In this same Memorandum Opinion and Order (FCC 66-61), the proceeding was remanded for the second time in order that a Policy Statement (FCC 65-1153) on Section 307(b) Considerations for Standard Broadcast Facilities Involving Suburban Communities, ^{2/} and released December 27, 1965, may be applied to this proceeding.

^{1/} Such issue required a determination of whether a grant of the proposal of Tidewater would be in contravention of the provisions of Section 73.35(a) of the Commission's Rules with respect to multiple ownership of standard broadcast stations; and, if so, whether circumstances exist which would justify waiver of the rule. The exact text of this issue is set forth on Page 2 of the Supplemental Initial Decision of April 1965. (FCC 65 D-16).

^{2/} This Policy Statement requires the determination of whether a suburban proposal will realistically serve its own specified station location or some other larger community where, as here, applicants' proposed 5 mv/m contours will penetrate the geographic boundaries of at least one other community of 50,000 persons and with a population at least twice that of a respective applicant's specified station location.

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7. The issues in this proceeding were, accordingly, enlarged to add the following additional issues:

- (a) To determine whether each of the proposals will realistically provide a local transmission facility for its specified station location or for another larger community, in light of all of the relevant evidence, including, but not necessarily limited to, the showing with respect to:
 - (1) The extent to which each specified station location has been ascertained by each applicant to have separate and distinct programming needs;
 - (2) The extent to which the needs of each specified station location are being met by existing standard broadcast stations;
 - (3) The extent to which each applicant's program proposal will meet the specific, unsatisfied programming needs of its specified station location; and
 - (4) The extent to which the projected sources of each applicant's advertising revenues within its specified station location are adequate to support its proposal, as compared with its projected sources from all other areas.
- (b) To determine, in the event that it is concluded pursuant to the foregoing issue (a) that one or both of the proposals will not realistically provide a local transmission service for its specified station location, whether each such proposal meets all of the technical provisions of the Rules, including Sections 73.30, 73.31, and 73.188(b)(1) and (2), for standard broadcast stations assigned to the most populous community for which it is determined that the proposal will realistically provide a local transmission service.

8. Subsequent to the second remand, further prehearing conferences were held on February 8, February 28, and May 11, 1966, and evidentiary hearings were held on May 17 and 18, June 21 and July 21, 1966, and the record closed on the last named date. Supplemental proposed findings of fact and conclusions of law were timely filed by both applicants and by the Broadcast Bureau, and reply thereto was timely filed by Tidewater.

Supplemental Findings of Fact

9. The supplemental findings hereinafter made are based upon evidence adduced at the further hearing held pursuant to the second remand order. The applications here under consideration request authorizations to establish new standard broadcast stations at Smithfield and Newport News, Virginia, respectively, to operate a Class II station on the frequency 940 kc, with a power of 10 kw, day-time only.

10. In view of the Commission's new policy relating to Section 307(b) considerations for standard broadcast stations in suburban communities, enunciated in December, 1965,^{3/} and since the proposed 5 mv/m contours of both applicants' proposals would penetrate the geographic boundaries of at least one other community of over 50,000 persons with a population at least twice as large as that of each applicant's specified station location, the issues in this proceeding were enlarged so that, in addition to the usual 307(b) evidence concerning the independence of a suburban community from its central city (much of which had already been adduced), the parties might fully explore all matters relating to the need for each of their proposals in the light of such new policy and in order to rebut the presumption which flows from the fact that the proposed 5 mv/m contours encompass the more populous community.

11. Tidewater, applicant for a station at Smithfield, has sought to rebut such presumption and introduced additional evidence under Issue (a), looking to that end. Edwin R. Fischer, whose application specified Newport News as the site of his proposed station, introduced no evidence in this second remand proceeding under the new Issue (a) and, thus made no attempt to rebut the presumption that his proposal is in reality one for Norfolk and not for Newport News.

Tidewater Proposal

12. The Tidewater application specified Smithfield as its station location. This city has a population of 3,010 persons and is located in Isle of Wight County, which has a population of 17,164 persons. Neither Smithfield nor any part of Isle of Wight County is in an urbanized or metropolitan area. While Smithfield is a part of the Tidewater Virginia area, as are the nearby metropolitan or urbanized areas of Norfolk-Portsmouth, and Newport News-Hampton urbanized areas, it is situated across the James River from the Newport News-Hampton area, and across the James and Nansemond Rivers and the Hampton Roads portion of the Chesapeake Bay from the Norfolk-Portsmouth area.

^{3/}Policy Statement on Section 307(b) Considerations for Standard Broadcast Facilities Involving Suburban Communities (FCC 65-1153) released December 27, 1965.

13. Smithfield and Isle of Wight County in which Smithfield is located are part of the Tidewater Virginia Area, which encompasses the southeastern corner of the State of Virginia and occupies about 3,000 square miles with a population of 800,000 persons. Such Area also includes, among other territory, the Norfolk-Portsmouth urbanized area and numerous nearby counties. Smithfield lies approximately 20 miles northwest of Norfolk and 10 miles west of Newport News.

14. In the Policy Statement, supra, the Commission specifically stated that where a proposal's 5 mv/m daytime contour would penetrate the geographic boundaries of more than one community with a population of over 50,000 persons and having at least twice the population of the applicant's specified community, the presumption which must be rebutted will apply with respect to the largest of those communities only. Here, the 5 mv/m contour of Smithfield would encompass Newport News as well as Norfolk, but under such criterion and the facts of this case, consideration need be given only to Smithfield vis-a-vis Norfolk in a consideration of the Tidewater proposal.

Engineering Considerations

15. Detailed findings with respect to the engineering coverage of the Tidewater proposal are set forth in the July 1961 Initial Decision to which reference is made.^{4/} The engineering evidence adduced at the second remand hearing shows the proposed Smithfield 25 mv/m and 5 mv/m contours. Conductivity values shown on Figure M-3 in the Rules and an inverse field intensity of 570 mv/m for the proposed Smithfield operation were used to determine such proposed contours. The equivalent distance method was used where variable paths of conductivity intervened. All water paths were assumed to have a conductivity of 5,000 mm/m. The Smithfield proposal places a 5 mv/m signal over all of the Newport News-Hampton urbanized area and all of the Norfolk-Portsmouth urbanized area. It places a 25 mv/m signal over a portion of Norfolk but not over the main business district thereof. It would, however, provide a signal intensity of 19.95 mv/m to the furthest portion of the Norfolk main business district.

16. The proposed station would render a primary interference free service to 1,016,238 persons in an area of 6,584 square miles,^{5/} including all of the following counties in Virginia: Gloucester (11,919), Isle of Wight (17,164), James City (11,539), Mathews (7,121), Nansemond (31,366), Norfolk (51,612), Northampton (16,966), Princess Anne (76,124), Surry (6,220) and York (21,583); and Gates County (19,254) North Carolina. In addition to service to Smithfield

^{4/} See pages 10-11, paragraphs 20-24, of such Initial Decision.

^{5/} If the presently pending application of Catonsville Broadcast Company (BP-16105) is granted, the interference free primary service area of Tidewater would be reduced to an area of 5,642 square miles, having a population of 970,682 persons.

Tidewater would place a 2 mv/m or better signal over all of the cities of Norfolk (305,872); Portsmouth (114,773); Newport News (113,662); Hampton (89,258); Suffolk (12,609); and Virginia Beach (8,091), all in Virginia.

Needs and Characteristics of Local Community

17. In addition to the evidence adduced at the original hearing with respect to the distinct and separate needs and characteristics of the Smithfield community, ^{6/} at the further hearing this applicant adduced additional evidence under Issue (a) relating to the needs for a local transmission facility in Smithfield. This additional evidence was in the form of written testimony from some 26 civic leaders and other persons who either reside or work in Smithfield. An analysis of their testimony follows:

(a) Dr. A. C. Rogers, a veterinarian who lives in Smithfield and practices in five nearby counties, is president of a local feed company and also aids in the livestock management of several large local farms, testified that there are unfilled needs for notifying the people in these areas of epidemics and new advances in preventive medicine affecting the local livestock industry; that many times he has had a need to notify local people of matters of immediate concern to them and found that the only method was the local weekly newspaper ^{7/} which is often too late to be of much immediate assistance. Dr. Rogers is also president of the Smithfield Little Theater and active in local Boy Scout work. He testified that public service announcements (PSA's) would assist the local Boy Scouts and Little Theater; that announcements concerning various productions of the Smithfield Little Theater had been sent to and made over stations WLPN, Suffolk; WTAR and WNOR, Norfolk; WVEC, Hampton; WGH, Newport News; and WAVY, Portsmouth, and some of the players from the Smithfield Little Theater had appeared as guests on the WTAR, Mildred Alexander Show. Until a representative of Tidewater contacted him relative to radio announcements, he had not considered the use of a radio station by or on behalf of the Boy Scouts. He did not know of any request to or offer by an existing station for the broadcast of such announcements.

^{6/} See findings made in the July 1961 Initial Decision.

^{7/} As an example, Dr. Rogers testified that earlier in the month the hog raisers were struck with a severe virus in their baby pigs, causing the loss of thousands of such pigs. Because of this disease the income of many hog raisers will be adversely affected this year and this, in turn, will affect all business in the area. Had it been possible to notify the local hog raisers at once, he feels precautions might have been taken to keep the disease off of many farms. To his knowledge no radio station is now or has broadcast such information.

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(b) According to Anne B. Driver, executive secretary of the Smithfield Chamber of Commerce, 8/ daily local news, commentary on area problems and local high school sporting events are not now being covered on a regular basis by any existing radio station and such programming is desirable; that on January 20 and 21, 1965, WTAR, Norfolk, Virginia, broadcast a 10-minute taped program "Operation Progress" sponsored and paid for by the Smithfield Chamber of Commerce which included interviews with the Chamber treasurer, the town mayor, and representatives of the two local packing companies. 9/ Other than this program, she had not considered use of a radio station by or on behalf of the Chamber of Commerce and she knows of no offer of air time ever having been made to the organization by an existing station.

(c) Francis E. Turner, who is employed by the Isle of Wight County Department of Public Welfare, testified that PSA's for her department are needed, but knows of no request having ever been made to or offer received from any radio station for broadcast of PSA's on behalf of her department. She had not considered use of a radio station by or on behalf of the County Welfare Department until a representative of Tidewater contacted her. According to Ruth E. Holland, the clerk of the Circuit Court of the Isle of Wight County who lives in the Isle of Wight Courthouse, PSA's are needed for the County Clerk's office. She knows of no request ever having been made to or offer received from any existing broadcast station to program such announcements. Until a representative of Tidewater contacted her relative to such announcements, she had not considered the use of a radio station by or on behalf of the County Clerk's office.

(d) According to Mary Newman Taylor, home economics extension agent for Isle of Wight County, PSA's and programs relating to improving homemaking practices are needed, but she knows of no request ever having been made to or offer received from any existing broadcast station for such programs or announcements. Until a representative of Tidewater contacted her relative to such programs and announcements, she had not considered the use of a radio station by or on behalf of the County Extension office.

8/ This organization will accept membership from a business and professional person in Isle of Wight County and in general considers any area of about five miles from Smithfield to be its sphere of influence.

9/ The Smithfield Area Chamber of Commerce paid WTAR \$200.00 "for station time and for the payment of a WTAR announcer to come to Smithfield to interview Town Officials and area industrialists who appeared on the interview announcements made over WTAR."

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(e) According to Mary W. Wells, who is employed by the Virginia Agricultural Extension Service as extension agent for home economics for the Isle of Wight County, PSA's and agriculture programming would be of value. She knows of no request having ever been made to or offer received from any existing broadcast station for such programs or announcements. Until a representative of Tidewater contacted her relative to radio programs and announcements, she had not considered the use of a radio station by or on behalf of the County Extension office. Clarence H. Stith, extension agent, with the Virginia Agricultural Extension Service, testified that a radio station could be used for 4-H Club activity discussions and leader training. He knows of no request ever having been made to or offer received from any radio station for broadcasting of programs by or on behalf of the County Extension office. Until a representative of Tidewater contacted him relative to radio programs and announcements, he had not considered the use of a radio station by or on behalf of the County extension office. Herbert L. Jones, the Isle of Wight Agricultural Extension Agent, testified that if a station is established in Smithfield, he can use it to advantage to broadcast programs to approximately 600 farmers in the county; that no request has ever been made to or offer received from any radio station for the broadcast of programs by or on behalf of the County Extension office because members of the staff do not normally go outside the county to appear on radio programs. However, one of the members of the Extension staff did appear on one 4-H Club program on WLPN, Suffolk, Virginia in 1965. Until a representative of Tidewater contacted him relative to radio programs and announcements, he had not considered the use of a radio station by or on behalf of the County Extension office.

(f) A. T. Adams, supervisor of agricultural education for eastern Virginia and mayor of Smithfield, testified that the FFA (Future Farmers of America) members in Smithfield have used radio to broadcast information about their Club activities, but no radio station is now broadcasting information about the FFA on a regular basis, and likewise no station is now broadcasting news about Smithfield on a regular basis. He knows of no request having ever been made to or offer received from any station for broadcast of such programs and announcements. Until a representative of the Tidewater Broadcasting Company contacted him, he had not considered the use of a radio station by or on behalf of any of the FFA chapters in Isle of Wight County. Wayne C. Garst, the Extension Agent, Farm Management, for the southeast district of Virginia, is of the view that a local radio station could be used for interview programs and for PSA's. Until a representative of Tidewater contacted him relative to radio programs and announcements, he had

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not considered the use of a radio station by or on behalf of the Farm Management Division of the Extension Service and knows of no request having ever been made to or offer received from any radio station for broadcast for such radio programs or announcements.

(g) George F. Walls, the postmaster of Isle of Wight, Virginia, who lives near the Courthouse at Isle of Wight, Virginia, west of Smithfield, and is presently the director for Civil Defense for Isle of Wight County, is of the view that PSA's of the time and place of Civil Defense meetings and to alert the public in case of a disaster could be broadcast if a radio station were readily available in the county. Programs prepared by national authorities on National Civil Defense could also be broadcast. Until a representative of Tidewater contacted him relative to radio programs and announcements, he had not considered the use of a radio station by or on behalf of the Isle of Wight Civil Defense and he knew of no request having ever been made to or offer received from any radio station for broadcast of such radio programs or announcements.

(h) James O. Branch, the town manager of Smithfield, is of the view that a radio station would be "of great value and assistance in disseminating public information and announcements" for Smithfield activities. Until a representative of Tidewater contacted him relative to radio announcements, he had not considered the use of a radio station by or on behalf of the town of Smithfield and he knows of no request having ever been made to or offer received from any radio station for broadcast of such announcements.

(i) Franklin E. Hall, a resident of Smithfield and currently president of the Smithfield Junior Chamber of Commerce, is of the view that PSA's are needed for his organization. Until a representative of Tidewater contacted him relative to radio programs and announcements, he had not considered use of a radio station by or on behalf of the Smithfield JCC's, except in one instance which related to Smithfield Homecoming last year. WGH broadcast announcements requested by Smithfield in regard to this Homecoming. He knows of no other request ever having been made to or offer received from any radio station for broadcast of programs or announcements on behalf of the Smithfield JCC's.

(j) Robert J. Little, Jr., chief of the Smithfield Volunteer Fire Department, is of the view that PSA's would be of value in alerting volunteer firemen and in keeping citizens informed of each fire or life-saving call. Until a representative of Tidewater contacted him relative to radio programs or announcements, he had not

considered use of a radio station by the Smithfield Volunteer Fire Department and knows of no request having ever been made to or offer received from any radio station for broadcast of such programs or announcements.

(k) James W. Eavey is superintendent of all the schools in Isle of Wight County, including the Smithfield schools. He resides in Smithfield and testified that a local radio station could better handle the broadcast of announcements as to school closing and reopening due to inclement weather. Such announcements have been made on WRVA, Richmond, WTAR, Norfolk, WYSR, Franklin, and WAVY, Portsmouth. These announcements required a long-distance call to the home cities of these stations. No existing station is broadcasting programs relating to the Isle of Wight County school system. Until a representative of Tidewater contacted him relative to radio programs and announcements, he had not considered the use of a radio station by or on behalf of the Isle of Wight County Public Schools, other than in reference to announcements of closing and reopening due to inclement weather. He knows of no request ever having been made to or offer received from any radio station for the broadcast of other programs or announcements concerning the school system.

(l) Mrs. Charles W. White, president of the Smithfield Junior Woman's Club, is of the view that if a radio station is established in Smithfield, the station could be used to announce the Club's meetings and special events. Until a representative of Tidewater contacted her relative to radio programs and announcements, she had not considered the use of a radio station by or on behalf of the Junior Woman's Club. She knows of no request having ever been made to or offer received from any radio station for broadcast of programs or announcements on behalf of her organization.

(m) Rodham T. Delk, former mayor of Smithfield, is of the view that a local radio station could be used for political broadcasts and for broadcasting of more extensive county news.

(n) A non-denominational national religious shrine, St. Luke's, is located in Smithfield. A. E. S. Stephens, a resident of Smithfield, is of the view that if a radio station could be established in Smithfield, it would be a wonderful opportunity to serve the area regularly by broadcasting joint religious services held at St. Luke's. Until a representative of Tidewater contacted him relative to radio programs or announcements, he had not considered use of a radio station by or on behalf of historical St. Luke's. He knows of no request having ever been made to or offer received from any radio station for broadcast of such programs.

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(o) Joseph A. Barlow, a resident of Smithfield, a past president of the Ruritan Club and a member of the Board of Directors of the Isle of Wight County Farm Bureau, believes that if a radio station were established in this area, the Ruritan Club and Farm Bureau could make use of its facilities for broadcast of concerts of the Smithfield High School Band and to broadcast a portion of "Boys and Girls State" from Smithfield High School. The Farm Bureau could use a local radio station to broadcast important Farm Bureau news and members could appear on agricultural programs to discuss various farm problems and prices. Until a representative of Tidewater contacted him relative to radio programs and announcements, he had not considered the use of a radio station by or on behalf of the Farm Bureau. He knows of no request having ever been made to or offer received from any radio station for broadcasts of such programs or announcements.

(p) Adelaide Little Gee, a resident of Smithfield, is of the view that a local station could broadcast announcements for the Woman's Club of Smithfield. Until a representative of Tidewater contacted her relative to radio programs and announcements, she had not considered the use of a radio station on behalf of the Woman's Club of Smithfield, except in 1964, when the major stations in the area were requested to make announcements about an antique fair sponsored by the Woman's Club of Smithfield. Such announcements were broadcast. Aside from this instance, she knows of no request ever having been made to, or no offer received from, any radio station for broadcast of announcements on behalf of the Woman's Club of Smithfield.

(q) John H. Andrews, manager of the Colonial Funeral Home in Smithfield, is of the view that daily broadcasts of local obituary notices are needed. Until a representative of Tidewater contacted him relative to radio programs or announcements, he had not considered use of a radio station for broadcast of obituary notices. He knows of no request ever having been made to, or offer received from, any radio station for broadcasts of such notices on behalf of the Smithfield area.

(r) According to S. A. Petrino, a resident of Smithfield, if a radio station is established in this area, the Kiwanis Club could utilize its services to broadcast excerpts from their horse show and to broadcast non-denominational devotional messages from the National Kiwanis Office. Until a representative of Tidewater contacted him relative to radio programs and announcements, he had not considered the use of a radio station by or on behalf of the Kiwanis Club. He knows of no request having ever been made to or offer received from any station for broadcast of such programs.

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(s) J. A. Everett, Jr., manager of the Smithfield office of the Home Telephone Company, is of the view that if a radio station could be established in the Smithfield area, it could announce to the public without delay warnings about hurricanes, ice storms, snow storms, and any other general disaster that would likely disrupt telephone communications. On May 15, 1966, as a result of a disastrous fire in Smithfield, telephones in the Smithfield area were temporarily disabled. He called WGH, Newport News, WTAR, Norfolk, and WLPM, Suffolk, to request that an announcement be made that service should be restored in about twenty-four to forty-eight hours. WTAR and WLPM made announcements as requested, but he did not get an answer from WGH. Later he learned that WGH had carried a story in its news that service would be out for three or four days. He contacted a WGH reporter and requested that announcements be made that service should be restored in twenty-four to forty-eight hours, and the announcement was made. Until a representative of Tidewater contacted him relative to radio programs and announcements, he had not considered the use of a radio station by or on behalf of the Home Telephone Co., except as above indicated.

(t) Warren F. Taylor, secretary of the Smithfield Area Ministers Association, is of the view that daily devotional messages by local pastors would be desirable and also that PSA's are needed. In past years, WGH and WTAR have made announcements, as requested, in connection with the closing of church services during snow storms. Until a representative of Tidewater contacted him relative to radio programs and announcements, he had not considered the use of a radio station by or on behalf of the Ministers Association, except insofar as announcements concerning the closing of churches due to inclement weather.

(u) Harold C. Taylor, the sheriff of Isle of Wight County, is of the view that if a radio station were established in the Isle of Wight area, he could use it to keep the people informed on an hourly basis announcing missing persons, stolen property, escapees and people wanted in violation of the law and to report to the people any disaster occurring in the area. Some of the stations in Norfolk and Newport News call him about big news stories such as a recent plane crash in Isle of Wight County, but that to his knowledge no radio station checks with his office on a regular basis. Until a representative of Tidewater contacted him relative to programs and announcements, he had not considered the use of a radio station by or on behalf of the Isle of Wight County Sheriff's Office.

(v) William A. Gwaltney, chairman of the Smithfield Planning Commission, is of the view that PSA's on behalf of such Commission are needed. Until a representative of Tidewater contacted him relative to radio announcements, he had not considered the use of a radio station by or on behalf of the Town Planning Commission.

18. Agriculture and livestock raising are the major components of the local economy. The Smithfield and Isle of Wight County area, while moving toward urbanization, is not now urbanized and relies heavily on farming in its economy. Farm equipment and supply businesses serve the agriculture interests and play an important role in the area's commerce. The raising of peanuts, hogs, corn and soybeans provide the livelihood of many residents. The processing of pork is the major industry of Smithfield, employing some fifteen hundred persons and handling about sixteen thousand hogs per week. The widely known Smithfield ham and many other pork products are produced in these local packing plants. Isle of Wight and other nearby counties produce pork for these meat packing plants. Likewise, the seafood industry plays an important role in the economic life of Smithfield and adjacent areas situated on the west side of the James River, that river and its tributaries providing fish, clams, oysters, and crabs which are processed in local plants.

Proposed Program Service

19. Extensive findings of fact concerning the program policies and proposals of the applicants appear in the Initial Decision (paragraphs 46, 47, 53 and 54). No additional evidence as to programming proposals was offered by either applicant.

The Extent to Which Existing Stations are Meeting Smithfield Needs

20. As found in the Initial Decision (paragraph 21 thereof), four existing standard broadcast stations provide a primary signal (2 mv/m or greater) to Smithfield: WRAP, 850 kc, 5 kw, and WTAR, 790 kc, 5 kw, both in Norfolk, Virginia; WGH, 1310 kc, 5 kw, and WFID (formerly WYOU), 1270 kc, 1 kw, daytime only, both in Newport News, Virginia.

21. Tidewater used two procedures in its effort to ascertain the service rendered by existing stations for and on behalf of organizations in the Smithfield community. First, the civic, charitable, agricultural, religious and service leaders of the community were asked (1) what offers of time or facilities had been received from existing stations, (2) what requests they had made for time on the facilities of existing stations, and (3) what use had actually been made of existing stations; and, second, written interrogatories were submitted to the stations which provide a 2 mv/m signal to Smithfield and a 0.5 mv/m signal to the surrounding rural areas.

22. Public witnesses, as found in paragraph 17, supra, testified that the organizations hereinafter named had not been offered, had not requested specifically, and had not used the facilities of a broadcasting station, except on the few occasions noted, even though each had a need for publicity or other services of a local radio station: Smithfield Rotary Club; Smithfield Boy Scouts; the Smithfield Chamber of Commerce, except for purchase of time on one Norfolk station; the Welfare Department of Isle of Wight County; the County Clerk's Office; the County Extension

Office of Isle of Wight County, except for one appearance on a 4-H Club program in 1965 on WLPM, Suffolk, Virginia;^{10/} Isle of Wight Civil Defense; the Town Government of Smithfield; the Smithfield Junior Chamber of Commerce; the Future Farmers of America Chapters in Isle of Wight County; the Office of the Mayor of Smithfield; the Smithfield Volunteer Fire Department; the Isle of Wight Public Schools, other than school closings in winter when long distance telephone calls are made by the school officials to Stations WRVA, Richmond, WTAR, Norfolk, WAVY, Portsmouth, WLPM, Suffolk, WYSR, Franklin, and WGH, Newport News; the Junior Woman's Club of Smithfield, the Smithfield Rotary Club and the Town Council of Smithfield; the Historical Society of St. Luke's, Smithfield; the Farm Management Division of the Agricultural Extension Service; the County (Isle of Wight) Farm Bureau; the Smithfield Ruritan Club; the Woman's Club of Smithfield, except for announcements of an antique fair by a "major station" of the area in response to a request; the Smithfield Recreation Association; the Colonial Funeral Home; the Smithfield Kiwanis Club; the Baptist Church and the Smithfield Ministers Association, except for announcements of closing of the Smithfield Baptist Church during snow storms made by Stations WTAR, Norfolk, and WGH, Newport News; the Isle of Wight County Sheriff's Office, except for telephone calls from Norfolk and Newport News stations on major events such as a plane crash in the county; and the Town Planning Commission of Smithfield. Many of the public witnesses gave specific examples as to how a local station could help their organizations' activities and objectives.

23. Replies to written interrogatories, in which the Broadcast Bureau joined Tidewater, were received from Stations WCNS, WRAP and WTAR, Norfolk; WGH and WTID, Newport News; WAVY, Portsmouth; WVEC, Hampton; and WBCI, Williamsburg. Of these stations, only WRAP, WTAR, WTID and WGH provide primary service (2 mv/m) to Smithfield. (Significant portions of the replies to the interrogatories made by these last four stations are set forth in Appendix A attached hereto and made a part hereof.)

24. Station WTID (1 kw), Newport News, does not provide any programming for Smithfield.

25. Station WGH, Newport News, has a high school correspondent in Smithfield who reports ball scores and school activities which are broadcast over the station. Public service announcements are broadcast on behalf of Smithfield organizations when requested and announcements as to school openings and closings during periods of inclement weather are broadcast upon request made - over long distance telephone - by the local Superintendent of Schools.

26. Station WRAP, Norfolk, broadcasts information concerning local weather and driving conditions in Smithfield and Isle of Wight County on the occasion of unusual or severe weather conditions. This information

^{10/} WLPM does not provide primary service (a 2 mv/m signal) to Smithfield but does provide primary service (a 0.5 mv/m signal) to the rural areas around Smithfield. (Initial Decision, Findings, paragraph 21.)

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is obtained from local officials and the state highway patrol. The station broadcasts PSA's in behalf of groups and organizations in Smithfield and Isle of Wight County. In the seven-day period preceding receipt of interrogatories, 15 PSA's were broadcast by the station on behalf of Smithfield groups and 20 on behalf of Isle of Wight County groups.

27. Station WTAR, Norfolk, broadcasts PSA's on behalf of organizations in Smithfield and Isle of Wight County; information as to school openings and closings for Smithfield and Isle of Wight County; and information as to driving conditions in Smithfield and Isle of Wight County during inclement weather. On special occasions, WTAR will broadcast directly from Smithfield. Station WTAR originated two days of broadcasting from Smithfield when the Smithfield Packing Co. plant opened recently. Students from Smithfield have participated in WTAR's "Prep Roundup" program.

28. WGH, WRAP and WTAR are regional stations serving the Tidewater Virginia area. Significant Smithfield news is reported in the stations' local (Tidewater Virginia) newscasts.

Projected Sources of Revenue

29. Vernon H. Baker, Tidewater's president, testified concerning the basis of his projections of revenue. Such projections were based upon his familiarity with Smithfield and the Tidewater Virginia area, and a list of business establishments in Smithfield and nearby towns, which he regarded as possible advertisers on the station, compiled from the classified section of the Smithfield Telephone Directory. Non-commercial and professional persons and organizations, such as doctors, dentists and churches, were not included in the list. Of the 156 business establishments listed, 101 were in Smithfield, 28 in Windsor, 15 in Crittenden, 11 in Chuckatuck, and 1 in Zuni. All of these communities are within the Smithfield local telephone exchange area and are located within 10 miles of Smithfield. Tidewater also adduced in evidence a report of the Smithfield Planning Commission entitled "Land Use, Population, and Economy"^{11/} which shows annual retail sales in Smithfield of \$6,884,670, representing 57% of Isle of Wight County's total of \$12,025,000. Wholesale establishments in Smithfield also conduct an annual sales volume of \$466,382, which is approximately three-fourths of the total wholesale business in the County of Isle of Wight. Based upon his knowledge of the area and his experience^{12/} and studies, Dr. Baker estimated that 70%

^{11/} A publication of the Governor's Office, Commonwealth of Virginia, Division of Industrial Development and Planning, December 1962.

^{12/} Baker's experience has included operation of stations in small communities, including Station WESR at Tasley, on the Eastern Shore of Virginia. The Tasley station had first-year revenues of about \$80,000 and by 1965 its revenues had increased to about \$115,000. The population of the Tasley community is less than that of Smithfield and the interference-free population of Station WESR is many fold less than that within the operation proposed by Tidewater.

of the first year's revenues of \$70,000 would come from local advertisers, i.e., "businesses within the Isle of Wight County area and adjacent areas." He also estimated that 5% of the total revenues would come from retail businesses in Norfolk and Newport News, and the remaining 25% would come from regional advertisers, i.e., ones selling their products throughout the area.

30. In connection with advertising revenues, it is noted that of the eight radio stations which responded to the interrogatories, three stations (WAVY, WTAR and WBCI) declined to answer the question relative to solicitation of advertising in Smithfield and Isle of Wight County, four (WCNS, WVEC, WGH and WTID) answered categorically in the negative, and one (WRAP) replied that advertising was not solicited on a regular basis in that area.

Fischer Proposal

31. Edwin R. Fischer specified Newport News as the station location in his application. The Fischer proposal will provide 5 mv/m service to all of Norfolk, Virginia, and will provide 25 mv/m service to 98% of the main industrial area and 47% of the main business district of that city. The balance of the main business district would receive a minimum signal of 17 mv/m. Fischer now states that he "is satisfied to have his application treated, under the new Sec. 307(b) criteria, by the standards applicable to a Norfolk^{13/} station. To that end, if waiver of Sec. 73.30 of the Rules were required in order to allow the maintenance of main studios at Newport News, Va. -- rather than in Norfolk or at the station's transmitter near Smithfield -- the same is hereby requested." Fischer, thus, did not attempt to rebut the presumption which flows from the fact that his proposal will provide a 5 mv/m signal over all of Norfolk.

13/ He has not, however, requested permission to so amend his application. The Policy Statement on Section 307(b) Considerations for Standard Broadcast Facilities Involving Suburban Communities, supra, specifically provides that, "[I]f the applicant fails to rebut the presumption, he will be treated as an applicant for the larger community and required to meet all of the technical provisions of our Rules, including Sections 73.30, 73.31, and 73.182(b)(1) and (2), for stations assigned to that larger community. An applicant who meets those technical requirements will be permitted to prosecute his proposal as if he were an applicant for that larger community. However, he will be accorded only the 307(b) preference to which that larger community is entitled and will be granted only upon the condition that he amend his application to specify the larger community as his station location." (Emphasis supplied.)

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32. This proceeding has been in hearing status for more than seven years. After the Initial Decision was issued, it was stayed by the Commission en banc from August 3, 1961 (FCC 61-935) to March 4, 1965 (FCC 65-161). Thereafter, the proceeding was reopened and remanded for consideration of a then new policy of the Commission relating to common ownership and control of stations as it affected Station WESR at Tasley, Virginia, and the Tidewater proposal. Such new policy had been embodied in an amendment of Section 73.35 of the Rules on June 9, 1964 (FCC 64-445). Thereafter, a Supplemental Initial Decision was issued on April 19, 1965. The findings made in (1) the Initial Decision (FCC 61D-102) released July 11, 1961, and (2) the Supplemental Initial Decision (FCC 65D-16) released April 19, 1965, are hereby reaffirmed and incorporated by reference in this Second Supplemental Initial Decision.

Conclusions

1. It is undisputed that both of the applications involved in this proceeding must now be considered in the light of the new suburban application policy enunciated by the Commission on December 27, 1965, since both proposals would place a 5 mv/m signal over all of Norfolk. The population of the most populous community, Norfolk, is far more than twice that of Tidewater's principal community, Smithfield; and, likewise, the population of Norfolk is more than twice that of Fischer's principal community, Newport News. The Tidewater Broadcasting Company, Incorporated, specified Smithfield as its station location in its application and has remained steadfast in that station location specification. While Fischer specified Newport News as his station location in his application, he now represents that he is "satisfied" to have his application considered as one for Norfolk.

2. Three separate evidentiary hearings have been held on these applications.^{1/} Much of the evidence adduced at the first hearing,

^{1/} The applications were designated for hearing by an Order released October 28, 1959; a full comparative hearing was held and an Initial Decision was released on July 11, 1961. Shortly after the issuance of such Initial Decision, the Commission en banc entered a stay thereof which remained in effect for more than three and one-half years. A change in the Commission's multiple ownership rules and policy required another hearing which was held and the Supplemental Initial Decision thereon was released on April 19, 1965. Still a third hearing was ordered after adoption of the new "suburban" application policy and after oral argument on exception to the first two Initial Decisions. That hearing, held pursuant to the second remand order, is the subject of this Second Supplemental Initial Decision.

held in the summer and fall of 1960, is pertinent to the issues under the new "suburban" application policy. Tidewater not only relies upon the earlier evidence, but also presented additional evidence directed specifically to the new issues set forth in the second remand order pursuant to which the instant hearing was held. Except for an engineering exhibit, Fischer adduced no evidence under the new issues.

3. As hereinbefore indicated, the Commission, in December, 1965, issued a policy statement establishing new criteria for Section 307(b) consideration of applications for standard broadcast facilities in suburban communities (6 RR 2d 1901), in which it was pointed out that over a period of years, the Commission had become increasingly concerned with applications for new standard broadcast stations in suburbs of larger cities. In the new policy statement, supra, the Commission specifically held that:

"We are convinced that the objective evidence of an applicant's proposed coverage, which reflects the engineering factors of ground conductivity, frequency, and power, is sufficient to raise a question as to whether the proposal will be a realistic local transmission service for its specified community or merely another reception service. Our experience compels us to conclude that as their power and coverage are increased to serve larger numbers of persons, stations in metropolitan areas often tend to seek out national and regional advertisers and to identify themselves with the entire metropolitan area rather than with the particular needs of their specified communities. For these reasons, it will be our policy in the future under Section 307(b) to examine every application for new or improved standard broadcast facilities to determine: (1) whether the applicant's proposed 5 mv/m daytime contour would penetrate the geographic boundaries of any community with a population of over 50,000 persons and having at least twice the population of the applicant's specified community. When such a condition is found to occur, a presumption will arise that the applicant realistically proposes to serve that larger community rather than his specified community. Where the test described above indicates penetration of each of two or more larger communities, the presumption will apply with respect to the largest of those communities. . . . (Emphasis supplied.)

"This new policy is intended to provide an accommodation of heretofore apparently conflicting allocation considerations. While we still wish to discourage any proposal that will be merely a sub-standard central city station, we are persuaded that many developing and deserving suburban communities should be afforded an opportunity to obtain a first local transmission service. Moreover, while we wish to encourage each applicant to propose as much power as he will need to comply with our allocation rules, every applicant who falls within our test will be required to demonstrate that his proposal is designed to provide a realistic local transmission service for his

specified community. We are convinced that reliance upon the applicant's proposed coverage is a reasonable basis for initiating inquiry into that applicant's intent, since the propagation of a 5 mv/m daytime signal into a community of at least 50,000 persons and over twice as large as the applicant's specified community generally results in the propagation of a competitive signal over a heavily populated area of substantial size, and since service to such an area has often led to our licensees' serving the transmission and reception needs of that area rather than the transmission needs of their specified communities.

"During the course of an evidentiary hearing to determine, inter alia, whether an applicant will realistically serve his specified community or another, larger community, that applicant will be required to rebut the presumption that will have arisen because of his proposed coverage. Thus, in addition to the usual 307(b) evidence concerning the independence of a suburb from its central city, an applicant will be expected, under our new policy, to adduce evidence at the hearing showing the extent to which he has ascertained that his specified community has separate and distinct programming needs. The parties will then be permitted to show the extent to which that community's needs are being met by existing standard broadcast stations, and the applicant will be expected to show the extent to which his program proposal will meet the specific, unsatisfied programming needs of his specified community. At the same time, although it would not necessarily be determinative, such an applicant would be expected to adduce evidence as to whether the projected sources of advertising revenues within his specified community are adequate to support his proposal as compared with the sources from all other areas. (Emphasis supplied.)

"If an applicant sustains his burden under the specified issues and rebuts the presumption, he will be treated as an applicant for his specified community and accorded all of the 307(b) considerations which flow therefrom. However, if the applicant fails to rebut the presumption, he will be treated as an applicant for the larger community and required to meet all of the technical provisions of our Rules, including Sections 73.30, 73.31, and 73.138(b)(1) and (2), for stations assigned to that larger community. An applicant who meets those technical requirements will be permitted to prosecute his proposal as if he were an applicant for that larger community. However, he will be accorded only the 307(b) preference to which that larger community is entitled and will be granted only upon the condition that he amend his application to specify the larger community as his station location. The application of an applicant who fails to rebut the presumption and fails to meet all of the technical requirements for that larger community will be denied." (Emphasis supplied.)

4. It thus seems clear that a primary concern of the Commission is that a station in a suburban community may subordinate its service to that community in order to serve the nearby larger city, thus failing to satisfy the needs of its designated community for service which has been shown or presumed to exist. The added issues and the proof required to meet them will be considered in that light.

5. The manner in which both applicants attempted to ascertain the separate and distinct programming needs of their respective communities is the subject of findings of fact set forth in paragraphs 45 and 52 of the Initial Decision herein. In this third hearing, Tidewater also adduced the testimony of 26 agricultural, civic, charitable and religious leaders of Smithfield who gave evidence concerning the need for local radio transmission service. It is concluded, as shown by the findings of fact in this and the prior Initial Decision in this proceeding, that both Tidewater and Fischer have established that each community has programming needs separate and distinct from the larger community of Norfolk.

6. Tidewater also offered evidence concerning the program service of the existing stations which provide a primary service signal to Smithfield and Isle of Wight County. Such evidence shows that while each of the existing stations seems aware of its responsibility to serve all of its service area, none devotes any significant time or effort to serving the particular needs of Smithfield and Isle of Wight County. The Smithfield area service from existing stations is limited, for the most part, to announcements of school closings due to weather conditions in the winter,^{2/} coverage of major, as distinguished from local or regional, news stories, a few public service announcements, and an occasional coverage of a local event. It is concluded that Tidewater has affirmatively established that the needs of Smithfield and Isle of Wight County for a local transmission radio service are not being properly met by existing stations. Fischer offered no evidence on this phase of the case, and it must be concluded, therefore, that he has not met his burden of proof under the new Issue (a)(2).

7. The programming proposed by each applicant is directed chiefly to the main community which it or he originally proposed to serve. In this connection, it is noted that while Fischer designated Newport News in his application as the principal community and now represents that he is "satisfied" to be considered as a Norfolk applicant, he made no showing of any change in his proposed programming.

8. With respect to the sources of projected revenue, Tidewater estimated that 70% of its first-year revenues of \$70,000 would be derived from local advertising, including 60% from business establishments in Isle of Wight County. It also estimated that an additional 5%

^{2/} These announcements require a request via long distance telephone from the local school superintendent to the Norfolk station which furnishes the service.

would come from retail businesses in Norfolk and Newport News, and that the remaining 25% would come from regional advertisers, i.e., ones selling their products throughout the area. These estimates were prepared by Dr. Baker upon the basis of his experience in operating stations in small communities, such as Tasley and Christiansburg, Virginia, his knowledge of the Smithfield area, studies of economic data, compilation of a list of potential business advertisers in Smithfield and nearby areas served by the local telephone exchange, and studies and interviews made in Smithfield and Isle of Wight County. The projected sources of advertising revenues from Smithfield and nearby areas (all situated on the west side of the James River), together with regional advertising, separate and distinct from that derived from metropolitan or urbanized areas, are sufficient to enable the proposed Tidewater station to operate as a small city and rural area station rather than as a large city station, and it is so concluded. Moreover, Tidewater has emphatically represented to the Commission that the proposed station will be so operated. Fischer offered no evidence under the new Issue (a)(4) which contemplates evidence as to revenue sources.

9. The evidence clearly supports the conclusion that Tidewater has sufficiently rebutted the presumption, flowing from the fact that its 5 mv/m contour encompasses Norfolk, and has realistically shown that its proposal will provide a local transmission service at its specified station location, Smithfield. On the other hand, Fischer made no attempt to rebut a similar presumption relative to his proposal and, in fact, stated that he is "satisfied" to have his application considered as one for Norfolk. The Commission has specifically pointed out that if such a presumption is not rebutted, it must be determined whether the proposal in question meets all the technical provisions of the Rules, including Sections 73.30, 73.31 and 73.188(b)(1) and (2).³

10. Section 73.188(b)(1) and (2) of the Rules provides that a transmitter site should be selected to provide (1) a minimum field intensity of 25 to 50 mv/m over the business or factory areas of the principal city, and (2) a minimum field intensity of 5 to 10 mv/m over the most distant residential section. Fischer's proposal would not satisfy the first of these requirements since only 47% of the main business district of Norfolk would fall within the proposed 25 mv/m contour. No showing was made as to the signal strength over

³ If the technical requirements are met, then the application may be considered for Section 307(b) purposes as one for the most populous community. However, in the event an application is considered as one for the larger populous community, certain procedural requirements must also be met, including amendment to the application to show change in the specification of the principal community proposed to be served, location of studio, etc.

the factory areas of Norfolk. He has shown that a signal of at least 17 mv/m would be provided to all of the main business district, but offered no other evidence to support a waiver of the rule. It must, therefore, be concluded that Fischer's proposal would not comply with Section 73.188(b)(1), and sufficient showing has not been made to support a waiver of such sub-section of the Rules. The proposal would place a 5 mv/m signal over all of Norfolk and thus complies with the requirement of sub-section (b)(2) of Section 73.188 of the Rules.

11. Section 73.30(a) of the Rules requires that the main studio be located in the principal community or at the transmitter. Fischer's only showing in this respect establishes that his main studio would be located within Newport News at a site therein to be determined. No amendment to the application has been submitted showing change in the main studio location. Likewise, no showing has been made to support a waiver of the Rule, in the event Norfolk is assumed to be Fischer's principal community.

12. As shown by the findings of fact set forth in this and the two prior initial decisions in this proceeding, and the entire record of this proceeding, Tidewater has successfully rebutted the presumption that it is an applicant for a Norfolk station, under the new 307(b) suburban policy due to the fact that its proposal would place a 5 mv/m signal over Norfolk, and it continues to be an applicant for authorization for the first local station at Smithfield, Virginia. Fischer, on the other hand, has failed - in fact made no effort - to rebut the same presumption as to his proposal for Newport News and has categorically stated that he is now "satisfied" to have his application considered as one for a Norfolk station. Assuming that the Fischer proposal is considered as one for a Norfolk station, his proposal, as elsewhere discussed, is not in compliance with the requirements of Sections 73.30 and 73.188(b)(1) of the Rules and sufficient justification for the waiver of such requirements has not been shown.

13. Moreover, Section 307(b) of the Communications Act of 1934, as amended, requires that the Tidewater application be preferred over that of Fischer, whether considered to be one for Norfolk or one for Newport News. Norfolk has four local AM stations, seven FM stations, and three television stations (one for CP only) for local transmission service to its inhabitants;^{4/} and, in addition, the city receives primary reception service from several other stations.^{5/} The relationship between Smithfield and Norfolk is not that of one existing between the more populous center in the same urbanized area and its satellite communities, such as the Washington, D. C. Urbanized Area referred to

^{4/} Records of the Commission officially noted.

^{5/} The service to Newport News is set forth in the Initial Decision.

by Fischer in his proposed findings and conclusions.^{6/} In the case of Smithfield, it is not a part of the Norfolk Urbanized Area or the Norfolk Standard Metropolitan Statistical Area. In fact, it is not a part of any such area. In consideration of Smithfield, it is significant that the U. S. Census Bureau in its report on the 1960 U. S. Census did not find the existence of common general social and economic characteristics or other criteria sufficient to include Smithfield in the Norfolk urbanized or metropolitan statistical areas. It is also of interest to note that while the highway distance between the two cities is about 19 miles, travel between them requires the payment in each direction of substantial bridge and tunnel toll fees because of water barriers, and that the two communities are in different telephone exchange areas.

14. The Broadcast Bureau places great emphasis on the power and frequency proposed by the applicants. To follow the theory set forth in the Bureau's proposed conclusions to its logical end would require denial of any proposal for a suburban station which would use more than minimal power and utilize other than a local frequency. Such interpretation of the policy statement is too restrictive.

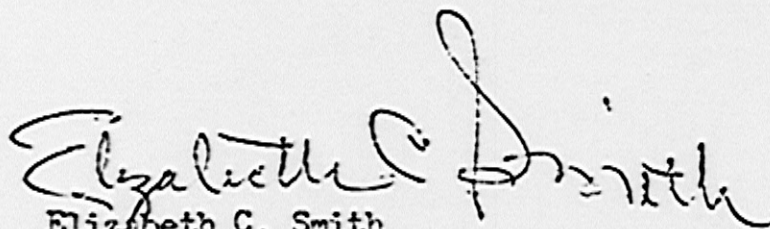
15. The application of Fischer must be denied for the reasons set forth in the Initial Decision and for the further fact that he has not shown in the further hearings that his application should be preferred over the Tidewater application, whether his proposal be considered as one for Newport News or Norfolk.

16. The Commission has already waived the provisions of Section 73.35 of its Rules with respect to the Tidewater application and has specifically held that the overlap of the 1 mv/m contours of Station WESR, Tasley, Virginia, and that of the Tidewater proposal does not bar a grant of the latter (Memorandum Opinion and Order (FCC 66-61), released January 20, 1966).

17. The conclusions in the Initial Decision and the Supplemental Initial Decision are hereby reaffirmed and it is again concluded, based upon the findings and conclusions in all three of the Initial Decisions in this proceeding, that the public interest, convenience and necessity would be served by a grant of the application of The Tidewater Broadcasting Company, Incorporated, and the denial of the application of Edwin R. Fischer.

^{6/} The suburban communities of Silver Spring, Wheaton, Morningside, Bethesda, etc. cited by Fischer are in each instance a part of both the Washington, D. C. Urbanized Area and the Washington, D. C. Standard Metropolitan Statistical Area established by the Census Bureau in connection with the 1960 U. S. Census. The Census Bureau determined the extent of these areas on the basis of location, community of interests, accessibility, density of population, and the fact that the components of such areas are all situated in the same "integrated social and economic system".

IT IS, ACCORDINGLY, ORDERED, This 13th day of January, 1967, that unless an appeal from this Second Supplemental Initial Decision is taken by one of the parties or the Commission reviews it on its own motion in accordance with the provisions of Section 1.276 of the Rules, the application of The Tidewater Broadcasting Company, Incorporated, for a construction permit for a new standard broadcast station to be operated on 940 kc with a power of 10 kw, daytime only, at Smithfield, Virginia, IS GRANTED, and that the application of Edwin R. Fischer for the same facilities to be operated at Newport News, Virginia, BE and the same is hereby DENIED.


Elizabeth C. Smith
Hearing Examiner
Federal Communications Commission

Released: January 17, 1967
and effective 50 days thereafter,
subject to the provisions of the
Rule cited in the ordering clause
above. Exceptions, if any, must
be filed within 30 days of the
release date unless an extension
is duly granted.

APPENDIX A

Interrogatories from Existing Stations

Specific responses to significant questions by stations placing a 2 mv/m signal over Smithfield were as follows:

Question III: "Please list the principal community or communities to which your station directs its service?"

The replies were as follows:

WRAP: "The principal communities to which WRAP directs its service are Norfolk, Portsmouth, Newport News, Hampton, Virginia Beach, Suffolk, Gloucester and Chesapeake, Virginia. In addition, the station serves numerous other communities which are smaller in size than the principal communities listed above."

WTAR: "WTAR Radio-TV Corporation principally serves Tidewater, Virginia area. Enclosed is a coverage map showing 42 counties in Virginia and North Carolina served by WTAR Radio-TV Corporation."

WGH: "Norfolk, Hampton, Newport News, Portsmouth, Virginia Beach, Chesapeake, York County."

WTID: "The principal communities served by WTID were identified in the application for assignment of license as Newport News and its sister city, Hampton. This continues to be the case."

Question IV(a): "If possible, please state the approximate percentage of your station's current local news programming which is devoted to local news of Smithfield and/or Isle of Wight County."

The replies were as follows:

WRAP: "It is believed that the percentage of the station's current local news programming which is devoted to local news of Smithfield and Isle of Wight County, Virginia, is about .075%."

WTAR: "It is impossible to answer this question since station WTAR does not keep records showing the amount of news devoted to each community it serves."

WGH: "Practically none."

WTID: "Station WTID does not broadcast local news directed to Smithfield or Isle of Wight County."

Question IV(b): "Describe the criteria employed by your station to determine if news items originating in Smithfield and/or Isle of Wight County should be included in your station's local news broadcasts."

The replies were as follows:

WRAP: "The significant news of Smithfield and Isle of Wight County is included in the station's local news broadcasts."

WTAR: "The criteria employed by station WTAR is whether or not such local news items are of significant importance to affect the business or social activities of Smithfield and/or Isle of Wight County."

WGH: "If considered of general, regional interest, our newsmen would contact appropriate officials."

Question IV(c): "Describe the sources from which your station obtain local news of Smithfield and/or Isle of Wight County."

The replies were as follows:

WRAP: "Local news of Smithfield and Isle of Wight County is obtained principally from the Associated Press newswire."

WTAR: "Station WTAR obtains its local news primarily from talking with the various civic leaders and business firms and law enforcement agencies in Smithfield and/or Isle of Wight County."

WGH: "As above--we maintain no stringers in that locality."

Question IV(d): "Does your station maintain local news gathering facilities in Smithfield or Isle of Wight County? If the answer is yes, please describe such facilities in detail, including the names of any persons employed there as news correspondents or stringers."

The replies were as follows:

WRAP: "No."

WTAR: "No, station WTAR does not maintain a local news gathering facility in Smithfield and/or Isle of Wight County."

WGH: "No."

Question V(a): "Please state whether it is your station's policy to broadcast public service announcements on behalf of groups and organizations in Smithfield and/or Isle of Wight County."

The replies were:

WRAP: "It is the station's policy to broadcast public service announcements in behalf of groups and organizations in Smithfield and Isle of Wight County."

WTAR: "Yes, station WTAR does make public service announcements on behalf of groups in Smithfield and/or Isle of Wight County."

WGH: "Yes, when requested."

WTID: Station WTID broadcasts public service announcements on a regular basis. However, because of the geographic lack of proximity between Smithfield-Isle of Wight County and WTID, no public service announcements on behalf of groups in Smithfield and Isle of Wight County have been broadcast since Big T Corporation acquired the ownership of the station."

Question V(b): "How many such announcements have been broadcast by your station in the seven days immediately preceding receipt of these interrogatories?"

The replies were:

WRAP: "In the seven days immediately preceding receipt of the interrogatories, about 15 public service announcements were broadcast by the station in behalf of Smithfield interests and about 20 in behalf of Isle of Wight County interests."

WTAR: "Station WTAR has not broadcast any such announcements in the seven days immediately preceding receipt of these interrogatories."

WGH: "None."

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Question V(c): "Identify the Smithfield and/or Isle of Wight County organizations on whose behalf such announcements have been broadcast."

The replies were:

WRAP: "The organizations on whose behalf such announcements were broadcast by the station include Smithfield, Virginia Civic League; Senior Class, Georgie Tyler High School, Windsor; Grace Union Chapter #56 OES, Smithfield; 9-60 S & S Club, Smithfield; Carrsville Woodpeckers; Smithfield Porkers; Bailey Pontiacs, Chuckatuck; New Jerusalem Church of God in Christ, Carrsville; VC Temple Church of God in Christ, Rt. 32, Isle of Wight County; Little Zion Baptist Church, Smithfield; Christian Home Baptist Church, Windsor; Missionary Society, Christian Home Baptist Church, Windsor; and Mt. Tabor Church of God in Christ, Smithfield, Virginia."

WTAR: "Such public service announcements have been broadcast on behalf of the Rotary Club, Ruritan Club, as well as the various schools in these areas."

WGH: No response.

Question V(d): "How many public service announcements of all types were broadcast by your station in the seven days immediately preceding receipt of these interrogatories?"

The replies were:

WRAP: "Approximately 900 public service announcements of all types were broadcast by the station in the seven days immediately preceding receipt of the interrogatories."

WTAR: "No such announcements were broadcast the seven days immediately preceding receipt of these interrogatories."

WGH: "240."

Question VI: "Does your station presently broadcast any religious programs or services from or on behalf of churches or religious congregations in Smithfield and/or Isle of Wight County?"

"If your answer is yes, please describe each such broadcast, giving the title of the program, the name of the religious organization on whose behalf it is broadcast, stating whether or not this program is regularly scheduled, its length and the day and time at which it is broadcast."

The replies were:

WRAP: "The station does not presently broadcast any religious programs or services from or on behalf of churches or religious congregations in Smithfield and Isle of Wight County."

WTAR: "No, station WTAR does not broadcast any religious programs or services from churches or religious congregations in Smithfield and/or Isle of Wight County. However, it does broadcast announcements concerning the various activities of religious groups in Smithfield and/or Isle of Wight County."

WGH: "No."

WTID: "No."

Question VII(a): "Does your station presently broadcast any programs of an educational nature from or on behalf of schools in Smithfield and/or Isle of Wight County?"

"If your answer to the preceding question is yes, please describe such programs as were broadcast during the preceding week, giving the title of the program, the name of the organization on whose behalf it is broadcast, stating whether or not this program is regularly scheduled, its length and the day and time at which it is broadcast."

The replies were:

WRAP: "The station does not presently broadcast programs of an educational nature from or in behalf of schools in Smithfield and Isle of Wight County."

WTAR: "Yes. During the year Station WTAR does have some of the students in its studios participate in the 'Prep Roundup' program. This program is regularly scheduled each Thursday, 7:35-8:00 p.m., from September through May."

WGH: "Not specifically. WGH has a high school correspondent in the high school in Smithfield who reports ball scores and school activities. Also one finalist on this year's \$500 Scholarship program was from Smithfield."

WTID: "The answers to both parts of this interrogatory are 'no'."

Question VII(b): "Does your station broadcast information as to school closings and reopenings pertaining to the schools in Smithfield and/or Isle of Wight County during periods of inclement weather?"

"If your answer is yes, please describe how such information is obtained."

The replies were:

WRAP: "The station does broadcast information as to school closings and reopenings with reference to schools in Smithfield and Isle of Wight County during periods of inclement weather. Such information is usually obtained by telephone."

WTAR: "Yes, station WTAR does broadcast information concerning school closings and reopenings for both Smithfield and Isle of Wight County. Station WTAR uses its own method, i.e., a secret number and code whereby the superintendent of schools acts as the sole representative of Smithfield and Isle of Wight County; he alone has the authority to tell us when schools will be opened or closed."

WGH: "Yes, on request...Superintendent."

Question VIII: "Does your station present any public affairs programs which, in the last six months, have presented any topics specifically related and local to Smithfield and/or Isle of Wight County?"

"If your answer to the preceding question is yes, please list the dates on which such programs were presented, the format and topic of each, explaining how each program was specifically relevant to Smithfield and/or Isle of Wight County, and listing the individuals or groups from Smithfield and/or Isle of Wight County who actively participated in the preparation and presentation of these programs."

The four stations replied in the negative.

Question IX: "State whether your station has, in the past six months, broadcast any editorials specifically relating to affairs in Smithfield and/or Isle of Wight County."

"If your answer to the above is yes, please submit with your answer a copy of such editorial(s), showing the date or dates of broadcast."

Stations WRAP, WGH and WTID answered in the negative. WTAR replied: "Station WTAR does not broadcast editorials."

Question X: "State whether, during the last local election campaign, your station carried any political broadcasts by or on behalf of candidates for local office in Smithfield and/or Isle of Wight County.

"If your answer is yes, please list the names of the candidates, their political affiliation, the office which they sought and the date or dates on which they or their spokesman appeared on your station."

Stations WRAP, WTAR and WGH replied in the negative.

WTID: "While Big T Corporation did not own Station WTID at the time of the last election, Big T has no information to indicate that any such programs were broadcast; and believes that none were broadcast."

Question XI(a): "State whether your station has, in the last six months, broadcast any sporting events originating in Smithfield and/or Isle of Wight County, or involving teams from Smithfield and/or Isle of Wight County.

"If your answer is yes, please list the dates on which such programs were broadcast, the length and time of each broadcast, and the names of the teams or individuals involved."

Stations WRAP, WTAR and WGH answered in the negative.

WTID: "Again, while Big T Corporation did not own Station WTID during the past six month period, Big T has no information to indicate that any such programs were broadcast, and believes that none were broadcast. Smithfield-Isle of Wight sports news is not treated as local or regional news by WTID."

Question XI(b): "Is your station's policy to treat sports news involving Smithfield and/or Isle of Wight County as local or regional sports news?"

Stations WRAP and WTAR replied as local. WGH replied regional.

Question XII: "Does your station currently present any local originations from Smithfield and/or Isle of Wight County?"

"If the answer to this question is yes, please give the time and frequency of the broadcast of these programs, explain briefly their format and list any groups and/or individuals who actively participated in the production and presentation of these programs."

The replies were as follows:

WRAP: "The station does not currently present any local originations from Smithfield or Isle of Wight County."

WTAR: "No, station WTAR does not currently present any local originations from Smithfield and/or Isle of Wight County. However, on special occasions such as the grand opening of the Smithfield Packing Company Plant, WTAR did originate two whole days of broadcasting from Smithfield."

WGH: "No, except spot news coverage."

WTID: "No."

Question XIII: "Does your station presently broadcast information concerning local weather and driving conditions and local working conditions in Smithfield and/or Isle of Wight County?"

"If your answer is yes, please describe in some detail the information broadcast, the source of the information, and the frequency or times of broadcast."

The replies were:

WRAP: "The station does presently broadcast information concerning local weather and driving conditions in Smithfield and Isle of Wight County on the occasion of unusual or severe weather conditions. This information is obtained from local officials and the state highway patrol. It is presented in the form of weather bulletins and it is not known with what frequency these broadcasts have taken place."

WTAR: "Yes, Station WTAR does broadcast information concerning driving conditions in Smithfield and/or Isle of Wight County during inclement weather. This is done frequently when necessary, and such information is obtained from the Sheriff's office and the State Highway Patrol."

WGH: "Not separately from other Tidewater news."

WTID: "No."

Question XIV: "Does your station regularly solicit local advertising business in Smithfield and/or Isle of Wight County?"

WCMS, WVEC, WGH and WTID replied in the negative, and WRAP replied "not regularly". WTAR, WAVY and WBCI declined to answer on the ground of privilege.

The replies of the other stations to the written interrogatories were generally similar to those of WRAP, WTAR, WGH and WTID. Each indicated an awareness of its responsibility to serve its service area. None showed any regularly scheduled special programming for Smithfield or Isle of Wight County.



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FCC 68-405
14274

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In re Applications of)

THE TIDEWATER BROADCASTING COMPANY, INCORPORATED)
Smithfield, Virginia)

EDWIN R. FISCHER)
Newport News, Virginia)

For Construction Permits)

DOCKET NO. 13243
File No. BP-12814

DOCKET NO. 13248
File No. BP-13114

Appearances

Robert M. Booth, Jr., on behalf of The Tidewater Broadcasting Company, Incorporated; William B. Bernton and E. Theodore Mallyck on behalf of Edwin R. Fischer; Larry M. Berkow, Ernest Nash, and Leo I. George on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

Adopted April 12, 1968 ; Released April 16, 1968

By the Commission: Commissioners Bartley, Loevinger and Wadsworth concurring in the result; Commissioner Cox not participating.)

1. The Tidewater Broadcasting Company, Incorporated, and Edwin R. Fischer are mutually exclusive applicants for construction permits to build and operate new standard broadcast stations in Smithfield and Newport News, Virginia, respectively. 1/ In our Order designating these applications for hearing, 2/ we found that each of the applicants is legally, technically and financially qualified, and we specified an issue to determine

1/ Both The Tidewater Broadcasting Company, Incorporated, hereinafter referred to as Tidewater, and Edwin R. Fischer, hereinafter referred to as Fischer, propose to operate new Class II stations on 940 kilohertz with 10,000 watts of power, daytime only, while utilizing a nondirectional antenna.

2/ FCC 59-1079, released October 28, 1959.

which of the applications would better provide a fair, efficient, and equitable distribution of radio service under Section 307(b) of the Communications Act. 3/ However, after completion of the specified hearing, 4/ we adopted our new Policy Statement on Section 307(b) Considerations for Standard Broadcast Facilities Involving Suburban Communities, 5/ in which we concluded that, where an applicant's proposed 5 mv/m daytime contour would penetrate the geographic boundaries of any community with a population of over 50,000 persons and with at least twice the population of the applicant's specified community, a presumption will arise that the applicant proposes to serve the larger community rather than his specified station location.

2. We also stated that the 307(b) Policy Statement would be applied to all pending proposals, as well as to those filed in the future, since it would materially assist us in making fair, efficient, and equitable allocations of standard broadcast facilities in metropolitan areas. 6/ Thus, in pursuance of the 307(b) Policy Statement, we concluded that this proceeding must be remanded for a further hearing because each

3/ In addition, this proceeding originally involved issues concerning the areas and populations to be served; interference caused and received; and a contingent standard comparative issue, which was to be considered if the 307(b) issue was not determinative. In the present posture of this proceeding, no question of interference remains to be resolved.

4/ Although Hearing Examiner Elizabeth C. Smith released an Initial Decision, 2 FCC 2d 368, on July 11, 1961, proposing to grant Tidewater's application, we were subsequently requested by Tidewater to reopen the record and to enlarge the issues in this proceeding to determine whether grant of the Tidewater proposal would contravene the provisions of Section 73.35(a) of our Rules with respect to the multiple ownership of standard broadcast stations. Due to the overlapping coverage areas arising from the proposed increase in power of commonly owned Station WESR, Tasley, Virginia, we concluded that a further hearing should be held to determine whether Tidewater's proposal complies with Section 73.35(a) or whether circumstances exist which would justify waiver of the Rule, FCC 64-355, released, as corrected, on April 30, 1964. Thereafter, Examiner Smith released her Supplemental Initial Decision, 2 FCC 2d 408, on April 19, 1965, in which she held, inter alia, that waiver of the Rule was warranted and that Tidewater's application should be granted. After hearing oral argument, en banc, on December 9, 1965, we adopted the findings and conclusions of the Examiner's Supplemental Initial Decision, holding that waiver of the Rule was warranted, 2 FCC 2d 364, 6 RR 2d 730 (1966). Thus, we do not need to give the overlap issue any further consideration at this stage of the proceeding.

5/ 2 FCC 2d 190, 6 RR 2d 1901 (1965).

6/ Ibid., paragraph 12.

of the applicants proposes 5 mv/m daytime service within the geographic boundaries of at least one other community, Norfolk, with more than 50,000 persons and with a population at least twice as large as that of the applicant's specified station location. 7/ In order to determine whether each of these proposals will realistically serve its own specified station location or some other larger community, we also revised the issues in this proceeding so that, in addition to the usual 307(b) evidence concerning the independence of a suburban community from its central city, the parties would fully explore all matters relating to the need for each of these proposals. 8/

3. By her Second Supplemental Initial Decision, 9/ Examiner Smith proposed to grant Tidewater's application and to deny Fischer's application. The Examiner concluded that Fischer, who did not offer any evidence to rebut the presumption that his proposal was for Norfolk, should be denied in view of his failure to comply with the technical provisions of our Rules for stations assigned to that community. On the other hand, the Examiner held that the showing made by Tidewater was sufficient to rebut the presumption that its proposal is for Norfolk and to establish that its proposal is realistically for the community of Smithfield. While we agree with the Examiner's conclusion that Fischer's application must be denied, we are convinced after consideration of the entire record in this proceeding that Tidewater's application should also be denied. 10/

7/ 2 FCC 2d 364, 6 RR 2d 730 (1966).

8/ We noted that each of the applicants would be expected to show the extent to which it has ascertained that its specified station location has separate and distinct programming needs, the extent to which these needs are not being met by existing standard broadcast stations, and the extent to which its program proposals will meet these needs. Additionally, we stated that each of the applicants would be expected to adduce evidence as to whether the projected sources of advertising revenues from within its specified station location are adequate to support its proposal as compared with its projected sources from all other areas.

9/ FCC 67D-1, released January 17, 1967.

10/ Before us for consideration are: (a) exceptions and supporting brief, which were filed on March 3, 1967, by Fischer; (b) exceptions and supporting brief, which were filed March 3 and 6, 1967, respectively, by the Chief, Broadcast Bureau; and (c) a reply to those exceptions and a supplement to its reply, both of which were filed on March 20, 1967, by Tidewater. We heard oral argument, en banc, on December 11, 1967, and, except as modified herein and by our rulings on exceptions which are attached as an Appendix, we adopt the findings of fact set forth by the Examiner in her Initial Decision and in her Second Supplemental Initial Decision. In view of our determination that both applications should be denied, however, our conclusions will be substituted for those of the Examiner in her Initial Decision and in her Second Supplemental Initial Decision.

4. Fischer's application originally proposed a new standard broadcast station for the 113,662 residents of Newport News, Virginia. 11/ Newport News is part of the Newport News-Hampton, Virginia, Urbanized Area (population 208,874) and is separated from Norfolk, Virginia (population 304,869), and the Norfolk-Portsmouth, Virginia, Urbanized Area (population 506,822) only by Hampton Roads where the James River flows into the Chesapeake Bay. In addition to serving Newport News, Fischer's proposal would provide 5 mv/m service to all of Norfolk, and, as indicated above, Fischer has now stated that he is satisfied to have his application treated as a proposal for a Norfolk station. However, Fischer's proposal would not comply with the requirement of Section 73.188(b)(1) of our Rules for stations assigned to Norfolk, 12/ since Fischer would provide 25 mv/m service only to 98% of Norfolk's main industrial area and to 47% of its main business district.

5. Fischer urges that his proposal would provide approximately 23.4 mv/m service for all of the main industrial area and for 63% of the main business district and that it would provide at least 17 mv/m service for all of Norfolk's main business district. Since virtually all of the industrial area, where the existence of man-made noise makes a high intensity signal most important, would receive the requisite service, Fischer contends that his proposal substantially complies with the requirement of Section 73.188(b)(1). Citing WGUN, Inc., 13/ Fischer concludes that his application can and should be granted on the condition that it be amended to specify Norfolk as his station location.

11/ The population figures in this paragraph are taken from the 1960 U. S. Census.

12/ Section 73.188(b)(1) provides that the site selected for location of a transmitter should meet the following conditions: "A minimum field intensity of 25 to 50 mv/m will be obtained over the business or factory areas of the city."

13/ 38 FCC 529, 4 RR 2d 853 (1965). In that proceeding, which was concluded prior to the adoption of the 307(b) Policy Statement, the applicant was permitted to change its station location from Decatur to Atlanta, Georgia, in spite of its failure to comply fully with Section 73.188(b)(1). We held that waiver of the rule was appropriate, since, inter alia, the applicant's failure to provide 25 mv/m coverage throughout the broadcast day occurs only because it must reduce power during critical hours to protect a Canadian station on the same frequency.

6. In determining whether Fischer's application should be granted as a Norfolk station, it is important to consider all aspects of his proposal throughout this entire proceeding. As noted above, Fischer originally specified Newport News as his station location and he urged during the initial hearing that his application was entitled to a 307(b) preference for that community. While Fischer recognized his obligation to serve his entire proposed listening area, it is abundantly clear that the principal emphasis of his program proposal was placed upon the needs of his listeners outside of the Norfolk-Portsmouth Urbanized Area. Indeed, in a letter dated January 3, 1966, and written shortly after the adoption of the 307(b) Policy Statement, it was urged that Newport News has a need for an additional standard broadcast station, that Newport News has separate and distinct programming needs, and that the primary thrust of Fischer's program proposal was to meet the needs of the Newport News-Hampton Urbanized Area. Nonetheless, during the most recent hearing, without seeking to amend his program proposal or offering any explanation of his prior statements, Fischer has stated that he is now satisfied to be treated as an applicant for a Norfolk station.

7. It is also significant that, while seven standard broadcast stations now operate in the Norfolk-Portsmouth Urbanized Area, only two standard broadcast stations are now assigned to Newport News and only three standard broadcast stations are now operating in the entire Newport News-Hampton Urbanized Area. In addition to those ten stations, four other standard broadcast stations are now operating in the nearby communities of Chesapeake, Suffolk, Virginia Beach, and Williamsburg, Virginia, and applications for still another facility in this area were recently designated for hearing. 14/ Although Fischer previously asserted that his application should be granted since Newport News has fewer stations than other smaller communities within the State of Virginia, he is now willing to increase the number of stations assigned to Norfolk at the expense of Newport News in order to obtain a grant of his application. 15/

14/ 9 FCC 2d 205 (1967). Docket Numbers 17605 and 17606, involving applications for Williamsburg and Suffolk, Virginia.

15/ In this connection, it should be noted that Section 1.525(b) of the Rules was amended to preclude the resolution of such conflicting 307(b) claims on the basis of the applicants' private interests without permitting other interested parties to apply for the facility which otherwise would be abandoned. See FCC 51-1021, released August 4, 1961, 20 RR 1673.

8. We recognize that in the past Section 73.188(b)(1) has been waived and that grants have been made without absolute compliance with all of the provisions of that rule. ^{16/} However, in view of all of the circumstances in this proceeding, we are not persuaded that Fischer's application for a new facility warrants grant as a Norfolk station. In paragraph 9 of the 307(b) Policy Statement we pointed out that we "wish to discourage any proposal that will be merely a substandard central city station," and in paragraph 11 we clearly stated that an applicant, who fails to rebut the 307(b) Policy Statement presumption, as Fischer has failed to do, and who fails to meet all of the requirements for that central city, will be denied. As noted above, there are ample stations in Norfolk and throughout the metropolitan area, and Fischer has failed to provide any explanation for the inconsistency between his present willingness to adopt Norfolk as his community and his prior avowals concerning Newport News. For all of these reasons, it is clear that Fischer has not made a sufficient showing to justify either a waiver of Section 73.188(b)(1) or a finding of substantial compliance with that rule. Since the 307(b) Policy Statement was specifically adopted to assist us in making fair, efficient, and equitable allocations of standard broadcast facilities in metropolitan areas, we are convinced that it would be wholly inappropriate under the circumstances of this proceeding to permit Fischer to operate a new station in Norfolk which would not comply with all of the provisions of Section 73.188(b).

9. Tidewater, on the other hand, has attempted to show that its proposal will realistically provide a local transmission facility for Smithfield. The community of Smithfield had a population in 1960 of 917 persons, but its population has been increased since then to approximately 3,000 persons by virtue of Smithfield's annexation of the surrounding area. Smithfield is the largest community in Isle of Wight County, which has a total population of 17,164 persons. However, Tidewater's proposal would provide 2 mv/m service to an urban population in excess of 736,000 persons including all of the Newport News-Hampton and the Norfolk-Portsmouth Urbanized Areas and the cities of Suffolk and Virginia Beach. Thus, Tidewater's 5 mv/m service to Norfolk is, in the context of the 307(b) Policy Statement, merely one indication of the competitive signal which the Tidewater proposal would provide throughout the entire metropolitan area. At the same time, Tidewater would provide 0.5 mv/m or greater service to an additional population of at least 234,682 persons residing in other areas of Virginia and North Carolina.

10. In support of its proposal, Tidewater presented the written testimony of some 26 civic leaders and other persons, who

^{16/} See, for example, KDEF Broadcasting Co., 30 FCC 635, 20 RR 624 (1961).

either live or work in Smithfield, to establish that Smithfield has separate and distinct needs for a local transmission service. Although each of those persons indicated ways in which a local radio station could be used for the benefit of Smithfield, many of them also stated that they had never requested the assistance of or used the facilities of existing stations in the area. Nonetheless, written interrogatories answered by several of the stations in the area around Smithfield demonstrate that the needs of that community had not been completely ignored. Station WGH, Newport News, states that it reports the scores of Smithfield athletic events and other school activities, broadcasts public service announcements on behalf of Smithfield organizations when requested, and announces school openings and closings upon request of the Smithfield Superintendent of schools. Station WRAP, Norfolk, states that it broadcasts information concerning weather and driving conditions in Smithfield and Isle of Wight County during severe weather conditions and that it carries public service announcements for groups and organizations from both Smithfield and Isle of Wight County. Station WTAR, Norfolk, also carries announcements concerning Smithfield public service organizations, school closings, and driving conditions and states that it will broadcast directly from Smithfield on special occasions. Finally, each of the three stations asserts that significant Smithfield news is reported on its local newscasts.

11. Although Tidewater's program proposal is directed chiefly toward the needs of Smithfield and Isle of Wight County and the surrounding rural areas, the applicant recognizes its obligation to serve its entire listening area. Thus, in addition to the entertainment, news, and other programs which are designed for Smithfield and the surrounding rural area, a number of Tidewater's proposed programs would also be of interest to listeners throughout the urban areas, where more than 70% of Tidewater's potential audience resides. Tidewater's estimate concerning potential revenues was based primarily upon the knowledge and experience of its president, Vernon H. Baker. No attempt was made to contact advertisers in Smithfield or in the surrounding rural areas to determine whether they presently advertise or whether they would be interested in purchasing advertising over a local radio station. Nonetheless, in spite of the fact that Isle of Wight County had annual retail sales of only \$12,025,000 during 1962, Baker estimated that approximately \$49,000 in advertising revenues would be obtained from businesses in Smithfield and the surrounding rural area during the station's first year of operation and that approximately \$21,000 would come from businesses selling their products throughout the metropolitan area.

12. Tidewater urges that these facts are sufficient to rebut the presumption that it realistically proposes to serve Norfolk rather than Smithfield and that this evidence justifies a grant of its application. In addition, Tidewater contends that its proposed 10,000 watts of power are necessary to serve the rural areas around Smithfield and that its proposal is consistent with the 307(b) Policy Statement, which indicates that a developing and deserving suburban community should be afforded an opportunity to obtain a first local transmission service. Tidewater then asserts that Smithfield is not within the Norfolk-Newport News metropolitan area and that its proposed 5 mv/m contour falls over Norfolk only because of the high conductivity of the salt water path which lies between Smithfield and Norfolk. Finally, Tidewater claims that similar applications have been granted without hearing on a lesser showing than the one it has made in this proceeding.

13. While we stated in the 307(b) Policy Statement, and while we still believe, that smaller communities should be afforded an opportunity to obtain a local radio station, such determination cannot be divorced from our further conclusion that, as power and coverage are increased to serve larger numbers of persons in metropolitan areas, stations often tend to seek out national and regional advertisers and to identify themselves with the entire metropolitan area rather than with the particular needs of their specified communities. Thus, we also stated in the 307(b) Policy Statement that substandard central city stations should be discouraged and that such applicants should only propose as much power as they need to comply with our allocation rules. In this respect, Tidewater has not shown what effect use of lower power, directionalized operation, or a different transmitter site would have upon its proposal. Nor can Tidewater's contention that Smithfield is not located within the metropolitan area be given substantial weight in view of the evidence in this proceeding which establishes that Tidewater's 10,000 watt proposal would place an extremely competitive signal, not only in Norfolk, but all over the entire metropolitan area. Although Tidewater is correct that conductivity over salt water will result in the extension of its signal in the metropolitan area, the evidence clearly establishes that, even if its 5 mv/m contour were projected only over land, the 10,000 watts of power which Tidewater proposes would still cause its 5 mv/m contour to penetrate the boundaries of Norfolk. The facts in this proceeding amply disclose the reasons why the 307(b) Policy Statement was based upon proposed coverage rather than upon the applicant's specified station location.

14. The further hearing pursuant to the 307(b) Policy Statement was held to permit Tidewater to present evidence demonstrating that it will provide a realistic local transmission service for Smithfield. It is clear, however, that the amount of evidence required to establish that an applicant will provide a realistic local transmission service depends in large measure upon the objective facts concerning that proposal. ^{17/} Therefore, applications which may have been granted in other proceedings must be considered within the context of their particular facts. In KEYZ Radio, Inc., ^{18/} an existing station requested permission to increase its power during daylight hours from 1000 watts to 5000 watts to improve its service for Anaheim, California, its specified community, and Orange County. Although the applicant's coverage of Los Angeles was also increased, its specified community had a population of approximately 104,000 persons and was one of the central cities of a standard metropolitan statistical area entirely separate from Los Angeles. Noting that there was only one other station in Orange County which had a population in excess of 1,000,000 persons, that the needs of Orange County organizations were not being met, and that national and regional advertising was sold on the basis of its audience in Anaheim and Orange County, we held that the applicant's entire factual showing was sufficient to establish that it would not become a Los Angeles station.

15. In Clay Broadcasting, Inc., ^{19/} the applicant proposed operation with only 500 watts for a community of nearly 9,000 persons. Although 5 mv/m service would be provided to the much larger city of Kansas City, Missouri, we found that the applicant proposed a relatively low power and omnidirectional radiation pattern, that its antenna was located to provide maximum service to its specified community and the surrounding county rather than to Kansas City, and that there was a need for a first local broadcast outlet for that suburban area. In view of all of the material presented by the applicant, we concluded that it had demonstrated that it would not become realistically a

^{17/} See the Memorandum Opinion and Order denying reconsideration of the 307(b) Policy Statement, 2 FCC 2d 866, 6 RR 2d 1908 (1966); and Monroeville Broadcasting Company, FCC 68-404, released this same date.

^{18/} 3 FCC 2d 407, 7 RR 2d 294 (1966).

^{19/} 4 FCC 2d 932, 8 RR 2d 687 (1966).

Kansas City station. 20/ In view of the facts in each of those proceedings, we are convinced that they are clearly distinguishable and are not precedents for our determination of this proceeding. 21/ While those applicants proposed power commensurate with the size of their specified communities and the surrounding areas and with the requirements of our rules, Tidewater proposes the relatively high power of 10,000 watts for a community of approximately 3,000 persons in a county with a total population of 17,164 persons. 22/

16. Although the community of Smithfield and Isle of Wight County are clearly independent of the overall metropolitan area because of the geographical characteristics of the area, it has been amply shown that Tidewater's 10,000 watt proposal would provide a new competitive service for approximately 736,000 persons throughout that metropolitan

20/ In WTOH, Inc., FCC 68-9, released January 10, 1968, which was decided after the oral argument in this proceeding, the applicant was permitted to change its directional antenna radiation pattern. Although the applicant's 5 mv/m coverage of Baltimore was thereby increased, we noted that the change did not involve either an increase in power or a move of the transmitter site closer to Baltimore; that the change was necessary to bring the applicant's present operation into compliance with the requirements of Section 73.188(b)(1) of the Rules for its specified community, Towson, which had a population of 19,090; and that the change was required to provide service for the portions of the surrounding Baltimore County (population 492,428) which had not previously received service from the county's only standard broadcast station. In light of the applicant's showing, we concluded that it had established that it would not become merely another Baltimore city station.

21/ WFLI, Inc., 3 FCC 2d 123 (1966), which was also cited by Tidewater, became effective pursuant to Section 1.276 of the Rules. However, our Public Notice, FCC 61-25, released January 6, 1961, 20 RR 1141, stated that an Initial Decision that automatically becomes final does not establish a binding precedent for future cases.

22/ In spite of its high power, Tidewater's proposal would not even provide service for all of the five county area which it claims its proposal was designed to serve. Nonetheless, even assuming that its proposal would cover all of that five county area, the potential audience in that area would be less than 95,000 persons and less than ten percent of its total potential audience as an area wide station.

area. Indeed, the 10,000 watts which Tidewater proposes would make it more powerful during daytime hours than any standard broadcast station presently assigned to that metropolitan area. In spite of the broad invitation to Tidewater in our remand Order to show that it will provide a realistic local transmission service for Smithfield, we are not persuaded that the record in this proceeding is sufficient to establish that Tidewater's proposal would not become merely another Norfolk station in view of its 10,000 watts of power and its substantial coverage of the entire metropolitan area.

17. We recognize that Smithfield has separate and distinct programming needs, 23/ but the record also demonstrates that, although present service could undoubtedly be improved, the needs of the relatively small population of Smithfield are not being ignored by the existing stations. This fact must also be considered in light of the meager showing which Tidewater has made with respect to potential revenues for its proposed station. Since Tidewater's proposal, serving virtually all of the metropolitan area with at least some programming of general interest on the highest powered station in the area, would be extremely attractive to regional and national advertisers, we can give very little weight to Tidewater's unsupported assertion that Smithfield and Isle of Wight County businesses would provide adequate revenues to support its station. In view of the propensity of licensees with such power and coverage to identify themselves with the entire metropolitan area and to serve the needs of that overall area at the expense of the transmission needs of their specified communities, 24/ we are convinced that Tidewater's proposal must be treated as an application for a Norfolk station. This is not meant to suggest that Tidewater's proposal will inevitably become merely another Norfolk station, but simply to indicate that Tidewater has failed to make a sufficient showing to

23/ The facts that Smithfield is located in a predominately agricultural area and is physically separated from the metropolitan area makes our present determination under the 307(b) Policy Statement unusually important, since a metropolitan area reception service would not likely remain responsive to those specialized needs.

24/ While a station should certainly meet the transmission needs of its specified community, we do not wish to infer that such a station is not also expected to provide reception service for its entire listening area. See Petersburg Television Corp., 19 FCC 451, 10 RR 567 (1954).

establish that it will not eventually become such a station in view of its high power, its broad coverage of the metropolitan area, and its failure to demonstrate that revenues adequate to support the station are available in Smithfield and Isle of Wight County. 25/

18. Since Tidewater has failed to establish that its proposal would not become a Norfolk station, it will be required to meet all of the technical provisions of our rules for stations assigned to that city. However, the record clearly establishes, and Tidewater does not dispute, that its proposal would not place a 25 mv/m signal over Norfolk's business and factory areas as required by Section 73.188(b)(1) of the Rules. While Tidewater has not requested a waiver of that provision of the Rules, we are convinced that, just as we held with respect to Fischer's application, it would be wholly inappropriate under the circumstances of this proceeding to permit Tidewater to operate a new station in Norfolk which would not comply with all of the provisions of Section 73.188(b). For all of the reasons set forth above, we conclude that the fair, efficient, and equitable distribution of radio service and the public interest, convenience and necessity would be best served by denial of both Fischer's and Tidewater's applications.

19. Although we have concluded that the applicants' present proposals must be denied, we are persuaded that the public interest would also be served by permitting the applicants to file new applications as soon as possible if they should wish to do so. While this proceeding was originally designated for hearing in 1959, it has been necessary to hold two further hearings because of modifications in our rules and policies and it has been necessary for Examiner Smith to prepare three separate Initial Decisions. Despite the applicants' failure to demonstrate that their present proposals are realistic, there are indications in this record that realistic proposals would fulfill specific programming needs for communities in this area.

20. Thus, we are persuaded that Section 1.519 of the Rules, prohibiting repetitious applications, should be waived to permit both applicants to file new applications, which will demonstrate that they are realistically designed to serve the needs of their specified communities. Those new applications may specify the same or a different community, so long as they comply with all of the technical provisions of our Rules, including Sections 73.30, 73.31, and 73.188(b)(1) and (2), for stations assigned to that community. The applicants may specify different transmitter sites and they may reduce their power. However,

25/ Even if Tidewater had shown that it could obtain sufficient revenues in Smithfield and Isle of Wight County to support its station, we are convinced that Tidewater's proposed power and coverage would still require its proposal to be treated as a Norfolk station under the facts and circumstances of this proceeding.

in no instance will either applicant be permitted to file a new application which would cause or receive interference in areas significantly differing from those areas in which interference would result from a grant of one of the applications which are being denied in this proceeding. 26/ At the same time, we shall permit any other interested parties to file applications, conforming to the requirements set forth in this paragraph, so that the most suitable proposal for this area may be selected.

21. ACCORDINGLY, IT IS ORDERED:

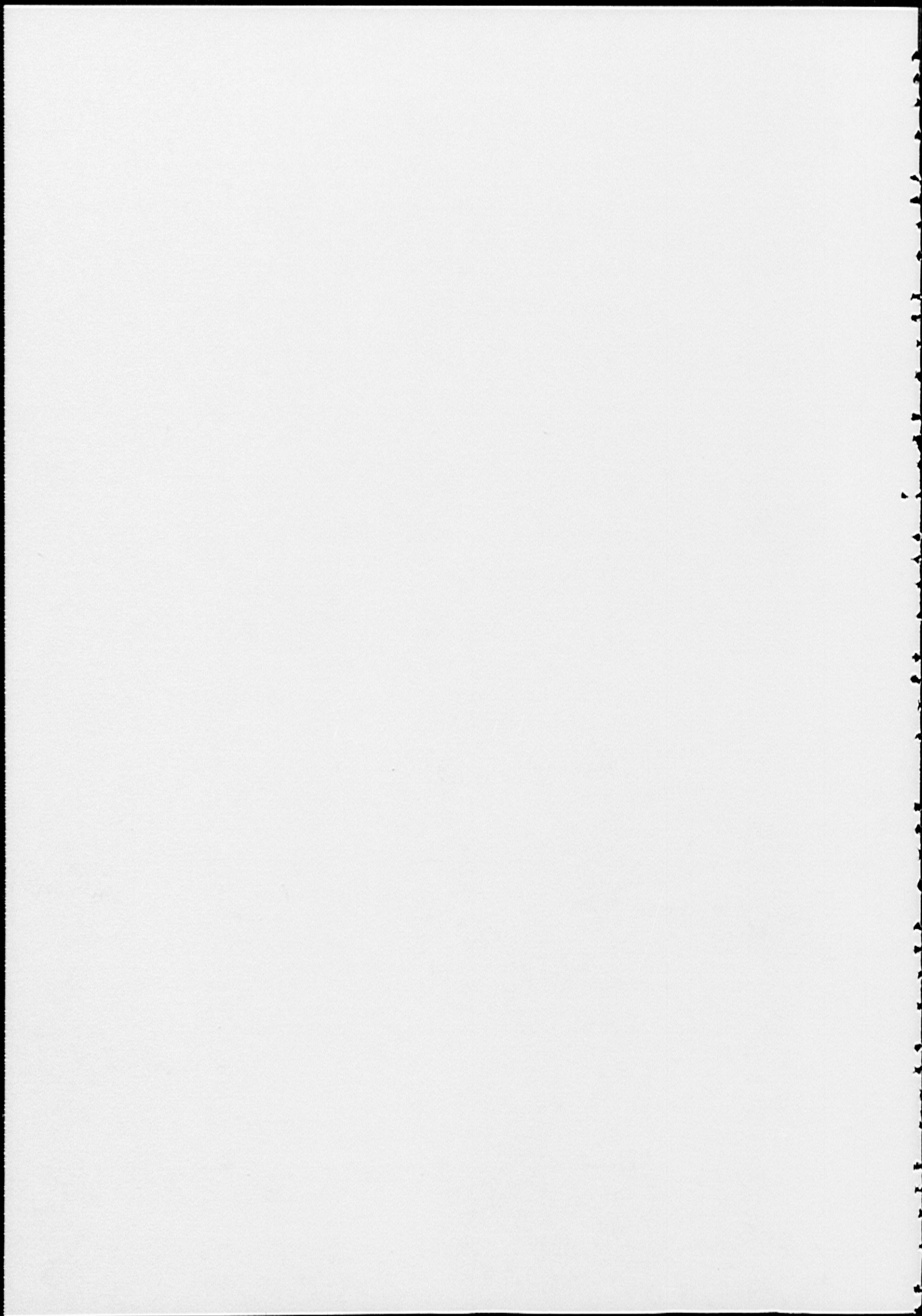
- (a) That the application of The Tidewater Broadcasting Company, Incorporated (File No. BP-12814), for a construction permit for a new standard broadcast station to operate in Smithfield, Virginia, IS DENIED;
- (b) That the application of Edwin R. Fischer (File No. BP-13114) for a construction permit for a new standard broadcast station to operate in Newport News, Virginia, IS DENIED; and
- (c) That Section 1.519 of the Rules IS WAIVED to permit The Tidewater Broadcasting Company, Incorporated, and Edwin R. Fischer to file new applications in conformity with paragraph 20 of this Decision.

FEDERAL COMMUNICATIONS COMMISSION

Ben F. Waple
Secretary

Attachment

26/ In view of the history of this proceeding, the need which exists for realistic proposals, and the apparent difficulty which either applicant would have meeting our present allocation rules, we shall also waive any provision of our present rules, including Section 73.35(a), which would preclude the filing of applications in conformity with this paragraph.



APPENDIX

Rulings on Exceptions to the Initial Decision

Exceptions of Edwin R. Fischer

<u>Exception No.</u>	<u>Ruling</u>
1-2	<u>Denied</u> . The Examiner's findings adequately and correctly reflect the record.
3-23, 25-36	<u>Denied</u> for lack of decisional significance in view of our Decision herein.
24	<u>Granted</u> to the extent reflected in paragraph 6 of our Decision herein.
37-56	<u>Granted</u> to the extent that the Examiner's conclusions have been deleted, but otherwise <u>denied</u> for lack of decisional significance in view of our Decision herein.

Exceptions of the Chief, Broadcast Bureau

1-3	<u>Granted</u> to the extent that the Examiner's conclusions have been deleted, but otherwise <u>denied</u> for lack of decisional significance in view of our Decision herein.
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Rulings on the Exceptions to the Supplemental Initial Decision

The rulings previously made and set forth in our Memorandum Opinion and Order at 2 FCC 2d 364, 6 RR 2d 730 (1966), are hereby reaffirmed.

Rulings on Exceptions to the Second Supplemental Initial Decision

Exceptions of Edwin R. Fischer

1	<u>Granted</u> to the extent that the Examiner's conclusions have been deleted, but <u>denied</u> in all other respects. See paragraph 17 of our Decision herein.
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<u>Exception No.</u>	<u>Ruling</u>
2	<u>Granted</u> to the extent reflected in paragraphs 10 and 17 of our Decision herein.
3, 6	<u>Granted</u> for the reasons set forth in our Decision herein.
4	<u>Granted</u> to the extent reflected in paragraphs 4 and 5 of our Decision herein.
5, 7	<u>Denied</u> for the reasons set forth in our Decision herein.
8-9	<u>Granted</u> to the extent that the Examiner's conclusions have been deleted, but <u>denied</u> in all other respects for lack of decisional significance in view of our Decision herein.
10	<u>Granted</u> to the extent that Tidewater's application is denied in our Decision herein, but <u>denied</u> in all other respects for the reasons set forth in our Decision herein.

Exceptions of the Chief, Broadcast Bureau

1	<u>Granted</u> to the extent that the Examiner's erroneous statement is deleted, but <u>denied</u> in all other respects since the Examiner's remaining findings adequately reflect the record.
2	<u>Denied</u> . The Examiner's finding adequately reflects the record.
3-5	<u>Granted</u> to the extent reflected in paragraphs 11 and 17 of our Decision herein, but <u>denied</u> in all other respects for lack of decisional significance in view of our Decision herein.
6, 8-9, 12-13	<u>Granted</u> for the reasons set forth in our Decision herein.
7	<u>Granted</u> to the extent reflected in paragraphs 4 and 5 of our Decision herein.
10-11	<u>Granted</u> . The Examiner's conclusions have been deleted.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

FCC 68-921
20213

In re Applications of)

THE TIDEWATER BROADCASTING COMPANY, INCORPORATED)
Smithfield, Virginia)

DOCKET NO. 13243
File No. BP-12814

EDWIN R. FISCHER)
Newport News, Virginia)

DOCKET NO. 13248
File No. BP-13114

For Construction Permits)

MEMORANDUM OPINION AND ORDER

Adopted September 11, 1968; Released September 16, 1968

By the Commission: Commissioner Cox not participating; Commissioner
Wadsworth abstaining from voting.

1. This proceeding involved the mutually exclusive applications of The Tidewater Broadcasting Company, Incorporated (Tidewater), and Edwin R. Fischer (Fischer) for construction permits to build and operate new standard broadcast stations in Smithfield and Newport News, Virginia, respectively. After completion of the hearing held pursuant to the Policy Statement on Section 307(b) Considerations for Standard Broadcast Facilities Involving Suburban Communities, 2 FCC 2d 190, 6 RR 2d 1901 (1965), we adopted a Decision denying both applications, 12 FCC 2d 471, 12 RR 2d 1133 (1968).

2. In our Decision we considered the evidence concerning Tidewater's proposal to use a 10,000 watt, nondirectional, daytime only operation to provide a first local transmission service for the community of Smithfield, which has a population of approximately 3,000 persons. At the same time, Tidewater's proposal would provide 2.0 mv/m service to an urban population in excess of 736,000 persons, including all of the Newport News-Hampton and the Norfolk-Portsmouth urbanized areas. While we found that Smithfield has separate and distinct programming needs and that its present service could be improved, we held that the needs of Smithfield's relatively small population were not being ignored by existing stations, that Tidewater's high-powered proposal would provide at least some programming of general interest to the entire metropolitan area and would be extremely attractive to regional and national advertisers, and that little weight could be given to Tidewater's unsupported assertion that Smithfield and Isle of Wight County businesses would provide adequate revenues to support its station.

3. In view of Tidewater's high power, its broad coverage of the entire metropolitan area, and its failure to demonstrate that adequate revenues would be available in Smithfield and Isle of Wight County, we concluded that the proposal had to be treated as an application for a Norfolk station and that, since the proposal would not comply with the requirements of Section 73.188(b)(1) of our Rules, it had to be denied. Although we also denied Fischer's application because of his failure to comply with the same rule, we noted that, in view of the long history of this case, the public interest would be served by permitting both applicants to file new proposals without waiting a year as would be required by Section 1.519 of the Rules. Accordingly, we stated that we would waive all rules necessary to permit new applications to be filed so long as they conform to the essential confines of the present proposals and comply with the technical provisions of the rules for their specified station locations. Finally, we held that any other interested party would also be permitted to file a similar application so that the most suitable proposal for this area might be selected after a further hearing.

4. On May 16, 1968, Tidewater filed a petition for rehearing of our Decision, 1/ urging that it should be permitted to amend its present application. By use of a two-tower directional antenna system from a new site with 5,000 watts of power, Tidewater contends that it can serve the same rural areas as with its present 10,000 watt proposal without placing a 5.0 mv/m signal over either Norfolk or Portsmouth. While a 5.0 mv/m signal would fall over the northern extremity of Newport News, Tidewater argues that this area is mainly a government reservation and military establishment and, thus, that it would achieve almost complete compliance with the 307(b) Policy Statement, supra. Tidewater claims that it could not have amended its application earlier without taking the chance of being removed from this hearing and returned to the processing line. Tidewater contends that, in order to prevent the waste of the efforts already invested in this proceeding, to minimize the additional costs to all parties, and to provide service to the public at the earliest possible time, we should reconsider our Decision and grant Tidewater leave to amend its application.

5. In its opposition, the Broadcast Bureau notes that there are certain engineering defects in Tidewater's proposed amendment and

1/ The following related and responsive pleadings are before us for consideration: a petition for leave to amend filed May 16, 1968, by Tidewater; a supplement to petition for leave to amend filed July 17, 1968, by Tidewater; an opposition to the petition for rehearing filed June 14, 1968, by the Chief, Broadcast Bureau; a reply to the opposition filed July 3, 1968, by Tidewater; and a petition to accept late filed reply filed July 3, 1968, by Tidewater. Counsel for the other parties have indicated that they have no objection to grant of Tidewater's petition for acceptance of late filed reply. Accordingly, it will be granted.

argues that, even if they were corrected, the amendment would not comply with the requirements of Section 1.522(b) of the Rules. Since a hearing would still be necessary pursuant to the 307(b) Policy Statement in view of the proposed 5.0 mv/m service to a portion of Newport News and since Tidewater failed to amend its application immediately after the adoption of the Policy Statement, the Bureau urges that the petition for leave to amend should be denied. Tidewater, by its reply, concedes that the necessity to file its petition within 30 days after the release of our Decision resulted in certain engineering errors. However, Tidewater asserts, those errors have been corrected, as reflected in its supplement to the petition for leave to amend, and its proposed amendment complies with the objectives of the 307(b) Policy Statement and the requirements for grant of an application as set forth in Monroeville Broadcasting Company, 12 FCC 2d 359, 12 RR 2d 946 (1968). Because the Policy Statement did not provide any procedure for amendment and because its proposed amendment was filed at the earliest possible time, Tidewater contends that it has shown good cause. But if its request is barred by any rule, Tidewater urges that it should be waived to avoid the expense and difficulties of a further hearing.

6. While we concluded that the public interest would be served, under the particular circumstances of this proceeding, by permitting both applicants to file new applications, we are not persuaded that Tidewater's present showing warrants grant of its petition for leave to amend. Tidewater is correct that the Policy Statement did not make any provision for amendment of applications already in hearing. However, this matter was considered in a number of adjudicative proceedings shortly after the adoption of the Policy Statement. Thus, in Dennis A. Sleighter and Willard D. Sleighter (WWDS), 3 FCC 2d 646, 8 RR 2d 23 (1966), the Review Board denied an appeal from the Hearing Examiner's ruling, permitting such an amendment. Although the hearing had been completed on the applicant's original proposal, it requested leave to reduce its power from 5,000 to 1,000 watts in order to avoid the impact of the Policy Statement. The Board held that there was good cause for the amendment, noting that the need to make the amendment could not have been foreseen before the adoption of the Policy Statement and that the Policy Statement encouraged deserving suburban communities to seek a realistic local transmission service. Compare KWEN Broadcasting Company, 3 FCC 2d 958, 8 RR 2d 310 (1966), where we also indicated that an applicant would be permitted to amend for the same purpose.

7. In spite of the Board's clear statement that applicants, who were already in hearing when the Policy Statement was adopted, would be permitted to amend their proposals to avoid a further hearing, Tidewater waited for nearly two years and until after we had adopted our final Decision in this proceeding to suggest that its proposal could be modified. Under these circumstances, it is clear that the adoption of the Policy Statement is not what prompted Tidewater's present request, but rather it is our Decision in this proceeding, and we have consistently

held that an applicant will not be given a further opportunity to make an improved showing that its application should be granted, when that showing could have been made during the course of the hearing. See, for example, Louis Adelman, 29 FCC 1223, 18 RR 106a (1960), aff'd sub nom. Guinan v. Federal Communications Commission, 297 F 2d 782, 22 RR 2026 (1961).

8. We also agree with the Bureau that a further hearing would be required on Tidewater's modified proposal in view of the 5.0 mv/m signal which would be placed over more than one-third of the area of the City of Newport News. As we stated in paragraph 9 of the Policy Statement, such a signal over a city the size of Newport News is a reasonable basis for initiating inquiry since it generally results in the propagation of a competitive signal over a heavily populated area of substantial size. In this respect, Tidewater has failed to make a full showing of the population and communities within the metropolitan area that would be served by the 2.0 mv/m contour of its modified proposal. While the changes that Tidewater has suggested could be made in its proposal would be entitled to weight, we are not persuaded that a sufficient showing has been made under all of the circumstances of this proceeding to avoid a further hearing pursuant to the 307(b) Policy Statement. For these same reasons, we have concluded that Tidewater has not demonstrated sufficient good cause to warrant waiver of those of our rules which would be required to permit its proposed amendment. Although we recognize that there will be additional expenses and delays, we are convinced that the public interest will be best served by simply permitting both of these applicants to file new proposals as we specified in our earlier Decision.

9. In the alternative, Tidewater asserts that there are certain errors in our Decision which require us to reconsider and set aside our denial of its application. In this respect, Tidewater claims that the 307(b) Policy Statement is unenforceable in its present form, that the basic objectives of Section 307(b) have been ignored, that relevant and material findings of fact were ignored in this proceeding, denying Tidewater due process of law, and that the Decision herein is incompatible with Monroeville Broadcasting Company, 12 FCC 2d 359, 12 RR 2d 946, which was adopted the same day.

10. Tidewater first urges that the Policy Statement cannot lawfully be used to deny an application, such as its own, which complies with every rule not previously waived, since the Policy Statement goes far beyond the instructions of the United States Court of Appeals in its remand of the Monroeville proceeding, 349 F 2d 199, 5 RR 2d 2086 (1965), and since the Policy Statement is not reasonably related to earlier suburban community cases. Tidewater also contends that the Policy Statement lacks facts or citations to support its conclusions and that

it is fatally vague and indefinite, because there is no definition of the terms used and because there is no specific description of the showing required to overcome the Policy Statement. In the absence of such standards, Tidewater argues, the Policy Statement demands a burden of proof which is impossible to meet since an applicant can never know what is expected of him. Tidewater asserts that the objective of Section 307(b) to provide both reception and transmission service throughout the nation has been subordinated to the 307(b) Policy Statement without any explanation of how an applicant can propose sufficient power to serve the needs of residents of farms and rural communities.

11. Tidewater claims that it has been denied due process by our failure to consider all of the relevant and material facts in this proceeding. While we stated that many Smithfield residents had never sought or used the facilities of existing stations in the area, Tidewater contends that we ignored the testimony of many witnesses concerning the needs of Smithfield and the fact that the closest existing stations are many miles away in Norfolk and Newport News. Tidewater asserts that we relied on each adverse example of service from those existing stations without considering favorable aspects of the record and that we neglected to consider the applicant's efforts to project sources of advertising revenues. Tidewater urges that our conclusions that its proposal would be extremely attractive to national and regional advertisers and that licensees with such power and coverage have a propensity to serve the entire metropolitan area at the expense of the transmission needs of their specified communities, are contrary to the findings of fact and are unsupported by a single fact in the record.

12. Finally, Tidewater asserts that our Decision in this proceeding is incompatible with the Decision we adopted the same day in Monroeville Broadcasting Company, supra. Although the community of Monroeville is almost contiguous to Pittsburgh, is in the same metropolitan area, and has ready access to Pittsburgh stations, Tidewater notes that we made many favorable findings with respect to the Monroeville proposal, while we failed to make such favorable findings for its proposal for Smithfield which is far removed from the metropolitan area and its broadcast stations. Tidewater concludes that such dual standards cannot be permitted and that our Decision in this proceeding must be reconsidered. In its opposition, the Bureau contends that Tidewater's arguments are without merit, and Tidewater's reply again urges that grant of its application would serve the public interest.

13. Initially, we are convinced that there is no inconsistency between our Decision in this proceeding and our Decision in Monroeville, supra. While Tidewater has noted some dissimilarities in the two Decisions favorable to its application, Tidewater has ignored the differences which were the fundamental reasons for the contrasting results in these two Decisions. As we stated in both Decisions, the amount of evidence required to overcome the presumption of the 307(b) Policy

Statement varies according to, among other factors, the applicant's proposed power, directionalization, and coverage. In Monroeville, the prevailing applicant proposed 250 watts of power, nondirectional operation, and limited coverage of the metropolitan area, whereas Tidewater's proposal would use 10,000 watts of power to serve virtually the entire metropolitan area. Although the geographic position of the applicants' specified station locations was considered in both Decisions, the importance of this factor, in each instance, was substantially diminished in view of the crucial differences in the applicants' proposed power and coverage of their respective metropolitan areas. Under these circumstances, it is clear that the grant of the Monroeville application was not in any way inconsistent with the denial of Tidewater's application in this proceeding.

14. By the same token, we cannot agree with Tidewater's contention that we have ignored relevant and material facts favoring its application. Our Decision notes that Smithfield has separate and distinct programming needs, that it is physically separated from the metropolitan area, and that the applicant made estimates of the advertising revenues to be obtained from Smithfield and the surrounding area. While these and all other circumstances favoring the applicant were considered in our Decision, the weight attributed to these facts was necessarily diminished in view of the other evidence demonstrating that Tidewater's high power would result in service to virtually all of the metropolitan area. As we stated above, each applicant's showing must be evaluated in the light of the objective facts concerning his proposed power and coverage, and, as is apparent from the analysis of Tidewater's showing in our Decision, the evidence upon which Tidewater relies is not sufficient to establish that its proposal would not eventually become a Norfolk station.

15. In considering Tidewater's remaining arguments that the 307(b) Policy Statement is improper and invalid, it is necessary to examine the background that led to the formulation of the Policy Statement. While Tidewater is correct that the matter was originally considered as the result of the remand of the Monroeville proceeding, 349 F 2d 199, 5 RR 2d 2036 (1965), we clearly indicated in our Memorandum Opinion and Order, 1 FCC 2d 319, 5 RR 2d 547 (1965), scheduling oral arguments, that broad aspects of the suburban community applicant question would be examined. As a result of that examination, we concluded that the previous approaches to this problem were not satisfactory and that a new policy was necessary to provide fair, efficient, and equitable distribution of standard broadcast stations in metropolitan areas. We noted that our experience in the allocation and regulation of broadcast facilities had persuaded us that stations in metropolitan areas, as their power and coverage are increased to serve larger numbers of persons, often tend to seek out national and regional advertisers and to identify themselves with the entire metropolitan area. Since such licensees serve the transmission and reception needs of the metropolitan area rather than the transmission needs of their own communities, we concluded that the

Policy Statement should be applied to all suburban community applications.

16. Although Tidewater objects to the premises underlying the Policy Statement, it has made no attempt to show that they are unrelated to our allocation goals or that our conclusions, based on knowledge derived from our supervision of the entire broadcast industry, are in error. Nor are we aware of any other proceeding in which these premises have been shown to be fallacious. Under these circumstances, we are not persuaded that the adverse conclusions concerning Tidewater's proposal in this proceeding are improper or that the Policy Statement is invalid in attempting to provide initial allocations which give assurance that they will not be misused in the future. Since the allocation of a broadcast facility in a specific community is generally an enduring assignment, whereas the identity of the licensee may change from time to time, we are convinced that each suburban application must be evaluated in light of the showing required by the Policy Statement.

17. Tidewater also contends that the Policy Statement is fatally vague and indefinite because an applicant can never know what is expected of him. However, there have been a substantial number of proceedings involving the Policy Statement which have resulted in grants of suburban applications. In addition to the cases to which we referred in our Decision in this proceeding, the necessary showing has been made in Naugatuck Valley Service, Inc. (WGNV), 8 FCC 2d 755, 10 RR 2d 737 (1967), aff'd sub nom. Northeast Broadcasting, Inc. v. Federal Communications Commission, ___ F 2d ___, 13 RR 2d 2102 (1968); and in Monroeville, supra. Thus, it is clear that not all applicants share Tidewater's alleged difficulty in understanding the intent and purpose of the Policy Statement. While we have attempted to set forth, simply and clearly, the scope of the problem and the nature of the evidence that would be considered pursuant to the Policy Statement, the particular factors that will be decisive in a specific proceeding can only be determined in the context of the facts and circumstances concerning that application, since each allocation of a standard broadcast station must be considered in the light of the individual characteristics of the proposed service.

18. We are also convinced that Tidewater is in error in urging that Section 307(b) has been ignored and subordinated to the demands of the Policy Statement. In fact, the Policy Statement was adopted in pursuance of our mandate to provide fair, efficient, and equitable distribution of broadcast service. It is self-evident that the intent of the statute would be violated if large numbers of broadcast stations were allocated to the major metropolitan areas and to the exclusion of suburban communities and rural areas. The 307(b) Policy Statement was thus adopted so that we will have the means to determine whether a

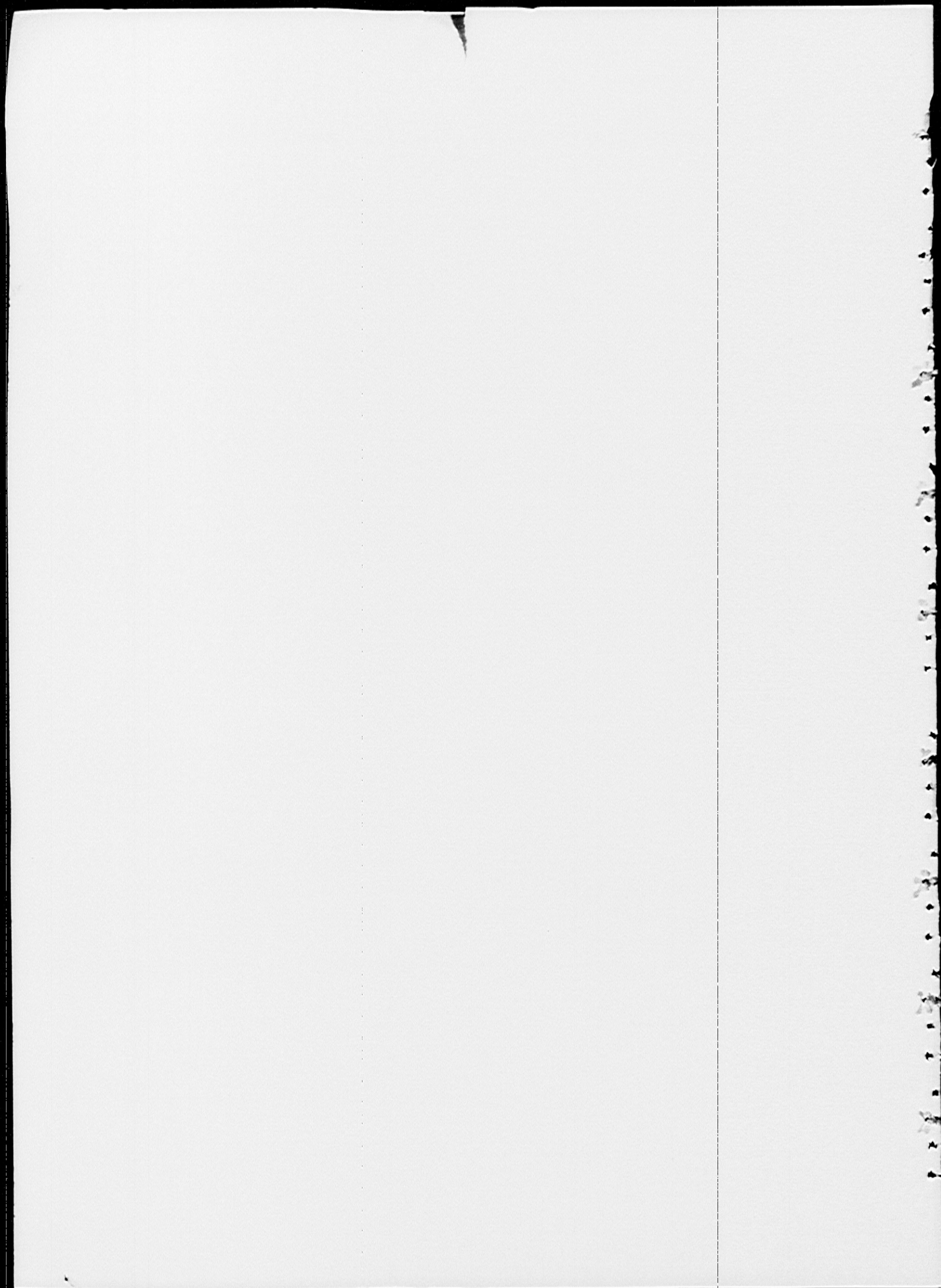
proposed allocation would provide a realistic local transmission service for its specified station location or merely another reception service for the entire metropolitan area. Because the Policy Statement is intended to assist us in making such allocations, it logically applies to all applications for new or improved service whether or not they are opposed by a competing application. For all of these reasons, we are convinced that the Policy Statement is a correct, appropriate, and, indeed, necessary procedure governing the allocation of standard broadcast stations in and around metropolitan areas and that our Decision denying Tidewater's application, proposing such a service, is correct in all respects. Under these circumstances, Tidewater's petition for rehearing must be denied.

19. ACCORDINGLY, IT IS ORDERED:

- (a) That the petition to accept late filed reply, filed July 3, 1968, by Tidewater Broadcasting Company, Incorporated, IS GRANTED;
- (b) That the petition for leave to amend, filed May 16, 1968, together with the supplement thereto, filed July 17, 1968, by Tidewater Broadcasting Company, Incorporated, IS DENIED; and
- (c) That the petition for rehearing, filed May 16, 1968, by Tidewater Broadcasting Company, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Ben F. Waple
Secretary



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BRIEF FOR APPELLEE

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,409

THE TIDEWATER BROADCASTING COMPANY, INCORPORATED,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee.

ON APPEAL FROM DECISIONS OF THE
FEDERAL COMMUNICATIONS COMMISSION

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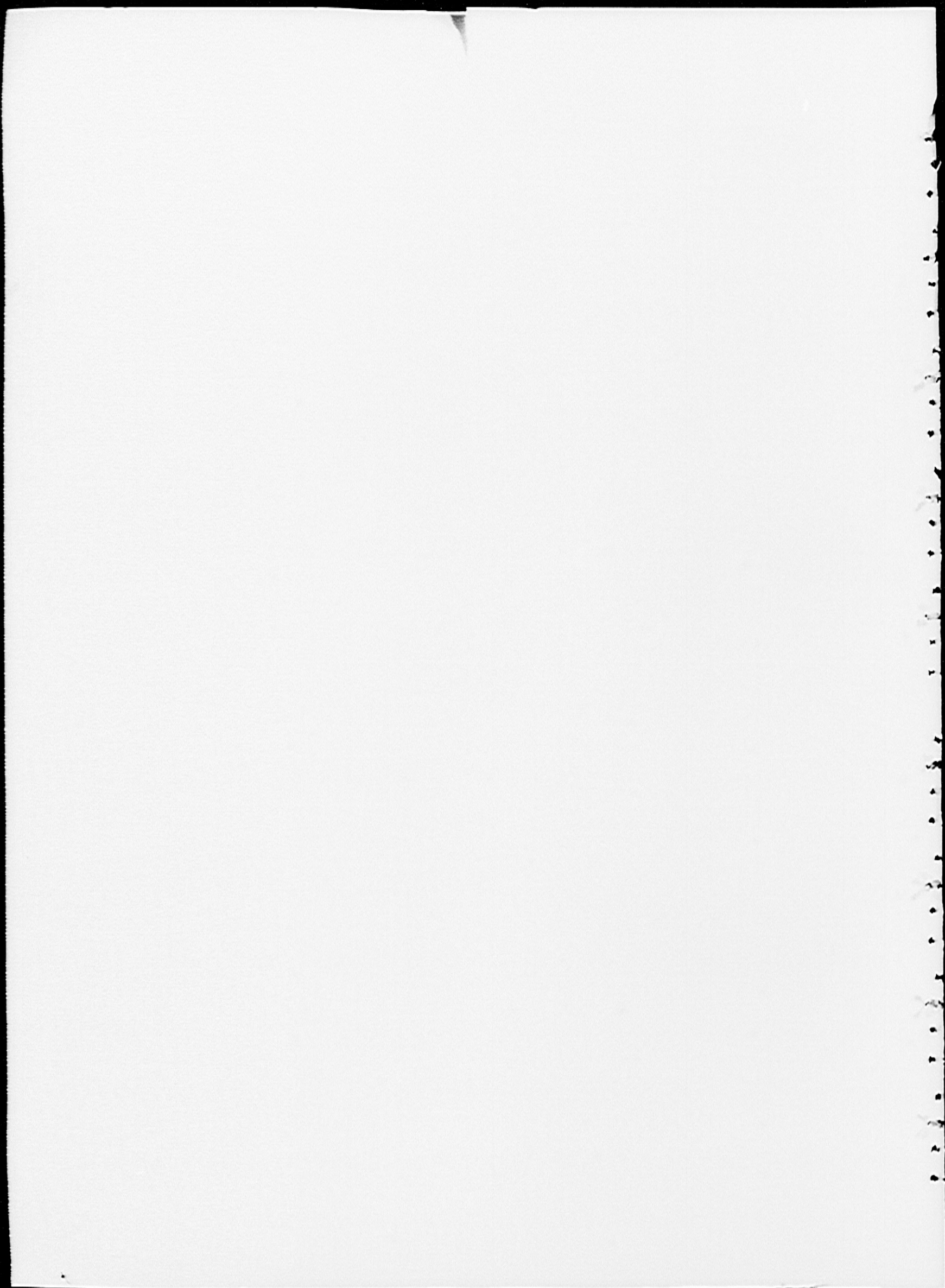


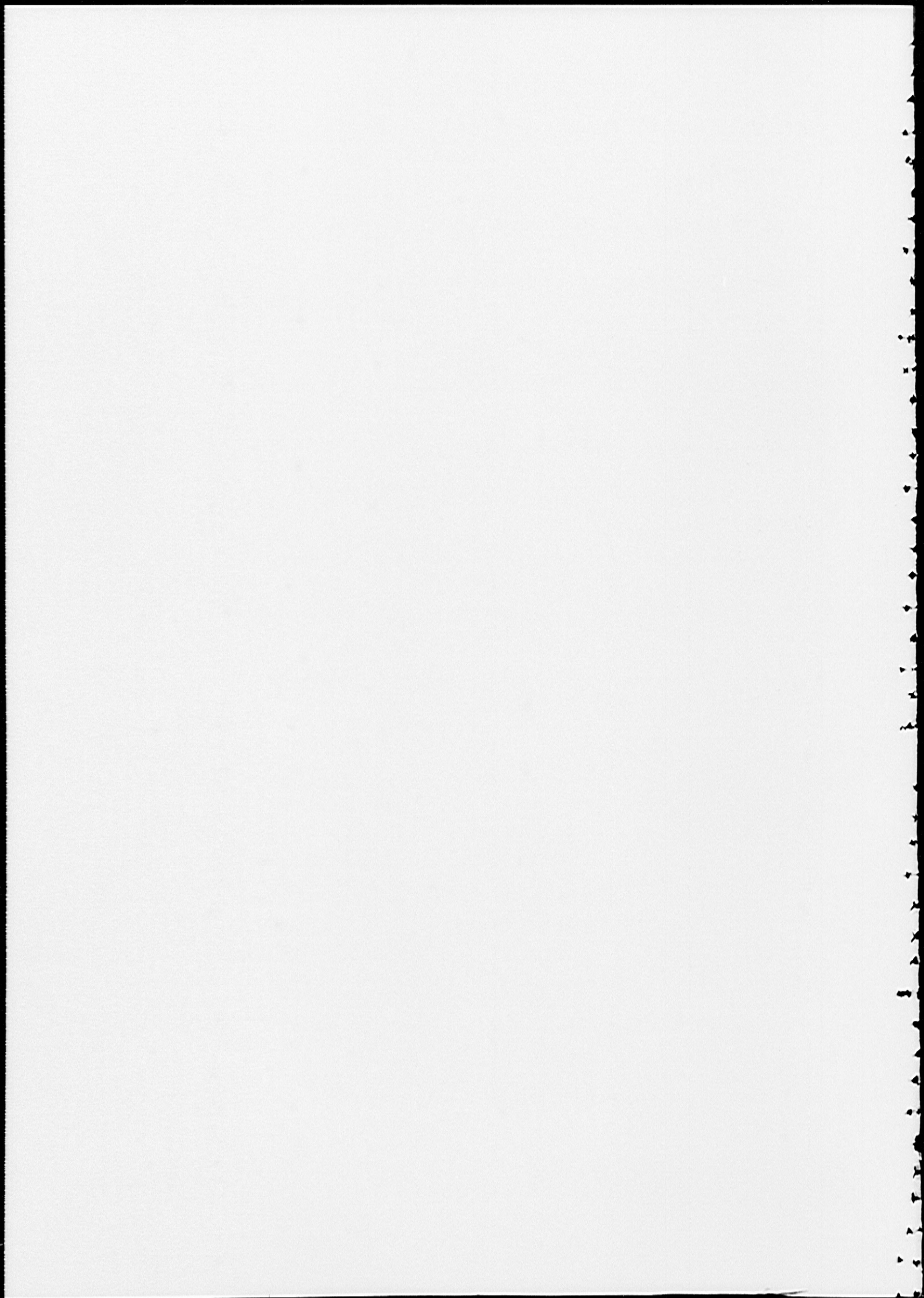
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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,400

THE TIDEWATER BROADCASTING COMPANY, INCORPORATED,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee.

ON APPEAL FROM DECISIONS OF THE
FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE*

Appellant Tidewater Broadcasting Company appeals from decisions (R. 1434A-0, 1513-65-72) of the Federal Communications Commission which denied its application for a new standard broadcast station for Smithfield, Virginia.

Tidewater's application proposed to operate a Class II station with an omni-directional antenna on 940 kilohertz with 10,000 watts of power, daytime only, in Smithfield. Its application

* All record citations in this brief are contained in the Appendix of the parties. Page references to appellant's brief refer to the typewritten copy; this arose because the briefs of the parties are being printed at the same time.

was mutually exclusive with that of Edwin R. Fischer^{1/} who proposed to operate a similar station in Newport News, Virginia. Both applications were denied because the applicants were unable to rebut the presumption that their proposals would not provide realistic transmission service^{2/} for their designated communities because of their coverage of the larger more central community of Norfolk. The presumption which they failed to rebut had been established by the Commission in its Policy Statement on Section 307(b)^{3/} Consideration for Standard Broadcast Facilities Involving Suburban Communities, 2 F.C.C. 2d 190 (1965), and provides that where an applicant's proposed 5 mv/m daytime contour penetrates the geographic boundaries of any community with a population of over 50,000 persons and with at least twice the population of the

^{1/} The appeal of Edwin R. Fischer, Case No. 21,942, from the same decision of the Commission has been consolidated with this case for purposes of oral argument. Both Fischer's and Tidewater's appeals are before the Court for the first time.

^{2/} In WSIX Broadcasting Station, 8 Pike & Fischer, R.R. 216, 217 (1952), the Commission defined transmission and reception service as follows: "Transmission service is the opportunity which a radio station provides for the development and expression of local interest, ideas and talents, and for the production of radio programs of special interest to a particular community. Reception service on the other hand is merely the presence in any area of a listenable radio signal."

^{3/} Section 307(b) provides as follows:

In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

applicant's specified community, the applicant must establish that its proposal will realistically serve the specified community in light of its extensive coverage of the central city. Both Tidewater and Fischer concededly raised the presumption.^{4/}

The Tidewater and Fischer applications were designated for hearing to determine, inter alia, which applicant's community had the greater need for a broadcast facility. Before a final decision was reached, the Commission issued its aforementioned 307(b) Policy Statement, applicable to all pending proposals. Because both Tidewater's and Fischer's proposals raised the presumption, further hearings were held to establish whether either proposal would realistically serve its own specified community or, instead, the larger community of Norfolk. The only part of the record pertinent to this appeal derives from this remand hearing on the Policy presumption. In order for Tidewater to establish that its proposal was in fact one for Smithfield, rather than for Norfolk, it was called upon to submit evidence regarding:

- (1) the separate and distinct needs of its designated community;
- (2) how those needs are presently met by existing stations;
- (3) how unsatisfied needs will be met by the proposed station;
- (4) whether the revenues available in the suburban community are adequate to support the proposed station.

^{4/} Smithfield has a population of 3,010 while Norfolk's population is in excess of 300,000.

The hearing examiner released her initial decision on the remand issues on January 17, 1967, proposing to grant Tidewater's application and to deny Fischer's. Upon review, the Commission adopted the examiner's extensive findings of fact, but concluded that Tidewater had also failed to rebut the ^{5/}presumption. Its reasons were later succinctly summarized by the Commission as follows (R. 1513-65):

While we found that Smithfield has separate and distinct programming needs and that its present service could be improved, we held that the needs of Smithfield's relatively small population were not being ignored by existing stations, that Tidewater's high-powered proposal would provide at least some programming of general interest to the entire metropolitan area and would be extremely attractive to regional and national advertisers, and that little weight could be given to Tidewater's unsupported assertion that Smithfield and Isle of Wight County businesses would provide adequate revenues to support its station.

The Commission further explained that "in view of Tidewater's high power, its broad coverage of the entire metropolitan area, and its failure to demonstrate that adequate revenues would be available in Smithfield and Isle of Wight County . . . the proposal had to be treated as a proposal for a Norfolk station and . . . since the proposal did not comply with the requirements of Section 73.188(b)(1) of our Rules, it had to be denied"^{6/} (R.1513-66).

^{5/} Memorandum Opinion and Order denying Tidewater's Petition for Rehearing (R. 1513-65 through 1513-72).

^{6/} Section 73.188(b)(1), 47 CFR 73.188(b)(1), reads as follows:

(b) The site selected should meet the following conditions:
(1) A minimum field intensity of 25 to 50 mv/m will be obtained over the business or factory areas of the city.

On May 16, 1968, Tidewater filed a petition for rehearing in which it directed various challenges to the validity of the 307(b) Policy Statement and requested that it be premitted to amend its application. After fully considering each of Tidewater's arguments, the Commission denied the petition for rehearing and the petition for leave to amend. This appeal followed.

SUMMARY OF ARGUMENT

The Tidewater Broadcasting Company, Incorporated's proposal for the community of Smithfield, population 3,010, exhibits exactly the problem which led the Commission to adopt its 307(b) Policy Statement. The Commission's experience in the allocation of broadcast facilities to communities on the edge of metropolitan areas is that as power and coverage increase, the station tends to attract national revenues and to identify itself with the entire metropolitan area. Therefore in its Policy Statement the Commission established a presumption which calls upon all applicants whose proposals cover central cities to establish that despite their central city coverage they will realistically serve the suburban community they have designated in their application.

Tidewater proposed to serve primarily the rural populace of Smithfield, but its 10,000 watts proposal covered virtually the entire Norfolk-Newport News metropolitan area with a primary signal. On a record made at a full hearing, Tidewater failed to show that its extensive power was necessary to provide a local service for

Smithfield. Moreover, appellant made no convincing showing that the community would support Tidewater's proposed station or that the broadcasting needs of the small population of Smithfield were being ignored by existing stations.

From the very outset, Tidewater was apprised of the issues which it needed to meet in order to rebut the presumption its coverage had raised. After proffering evidence at a full hearing based on issues specifically designed to elicit the pertinent information, and after the Commission had issued its decision holding that Tidewater had failed to rebut the presumption, Tidewater attacked the Policy Statement as being vague and sought to better its position by amending its proposal to provide for 5000 watts of power instead of its original 10,000 watts. The Commission, after noting that many other applicants had successfully rebutted the presumption and therefore did not share Tidewater's "vagueness" problem, refused to allow Tidewater to amend. However it should be noted that the Commission had provided that Tidewater could, in competition with others, submit another proposal immediately.

In its brief Tidewater reiterates the arguments it made to the Commission. But it has failed to demonstrate that either the 307(b) Policy Statement or the Commission's conclusions based on the examiner's findings are unreasonable. Instead, it offers alternative methods of insuring that suburban stations will be realistic local transmission services and alternative conclusions that the Commission could have reached. These alternatives, we submit, present no legal basis for reversal of the Commission's decision.

ARGUMENT

- I. THE 307(b) POLICY STATEMENT IS A REASONABLE MEANS OF INSURING THAT SUBURBAN COMMUNITIES WILL RECEIVE REALISTIC TRANSMISSION SERVICE. IT IS ENTIRELY CONSISTENT WITH THE COMMUNICATIONS ACT.

The Commission, based upon its experience gained over the years in connection with the allocation and regulation of broadcast facilities, adopted a Policy Statement in which it concluded that as their power and coverage increase to serve larger numbers of persons, stations in metropolitan areas tend to identify themselves with the entire metropolitan area rather than with the particular needs of their specified communities. In order to determine whether a proposal will be a realistically local transmission service for its specified community, the Commission has determined that where an applicant's proposed 5 mv/m daytime contour penetrates the geographic boundaries of any community with a population of over 50,000 persons and having at least twice the population of the applicant's specified community, a presumption will arise that the applicant proposes to serve the larger community rather than its specified station location. This presumption is rebuttable but should an applicant be unable to establish that its application is local in nature, it will have to meet all of the technical requirements of the Commission's rules for the larger community in order to be considered as a proposal for that community.

Tidewater attacks this statement of policy in the following respects: (1) that the above-recited premise on which the Policy Statement rests is invalid, (2) that the Commission has available sufficient existing rules and controls to insure realistic suburban transmission service, and (3) that appellant was unable to rebut the presumption because it is vague and indefinite.

Although we are unable to follow its reasoning, each of Tidewater's just recited arguments is premised on its contention that Tidewater's application was unopposed, and that the Commission's denial of such application was arbitrary in view of the fact that it complied with all of the Commission's rules and regulations. This assumption is factually incorrect. Tidewater's application was mutually exclusive with that of Edwin R. Fischer. It was vigorously opposed. Additionally, however, we respectfully submit that whether an application is opposed or unopposed is irrelevant to any consideration of whether the public interest would be served by allocating a proposed facility to a designated community.

A. The 307(b) Policy Statement Insures That
A Suburban Community Will Receive A
Realistic Transmission Service.

1. Appellant's Attack On The Underlying Premise Of The
Policy Statement Is Unsupported; The Policy Statement Is Equally
Applicable To Both Opposed And Unopposed Applications. Tidewater asserts (Br. 26-30) that the Commission's Policy Statement provides no adequate reason for denying an otherwise qualified applicant. This argument attacks the premise underlying the Policy Statement, i.e. that the Commission's "experience in the allocation and regulation of broadcast facilities" for suburban communities has led it to the conclusion that applicants proposing high powered operations for suburbs often tend to identify with the entire metropolitan area rather than the specified suburban community. An identical argument was made to the Commission by Tidewater in its Petition for Rehearing. In denying such petition, the Commission properly observed that Tidewater "has made no attempt to show that [the premises underlying the Policy Statement] are unrelated to our allocation goals or that our conclusions, based on knowledge derived from our supervision of the entire broadcast industry, are in error. Nor are we aware of any other proceeding in which these premises have been shown to be fallacious" (R. 1513-71). While Tidewater continues this bare attack in its brief, it also persists in its failure to offer evidence in support of its position.

Moreover, Tidewater seemingly concedes the Commission's knowledge in this area when it argues (Br. 27-28) that the Commission in applying its policy to single applicants draws only upon its experience in multi-party proceedings. This, it asserts, establishes the invalidity of its application to single party proceedings. Initially, even should we assume arguendo that the experience of the Commission is based only on multi-party proceedings, it in no way forwards Tidewater's case since its application was mutually exclusive with that of Fischer. Nevertheless, the contrary is the case. There is ample evidence of the Commission's concern with regard to single applicants for suburban communities who proposed central city coverage.^{7/} See 307(b) Policy Statement, 2 F.C.C. 2d 191-2; Denver Area Broadcasters, 38 F.C.C. 583 (1965); Northern Indiana Broadcasters, Inc., 3 Pike & Fischer, R.R.2d 267 (1964); Golden Triangle Broadcasting, Inc., 1 Pike & Fischer, R.R. 2d 871 (1963).

^{7/} Contrary to Tidewater's assertion (Br. 29 n. 28) the Policy Statement's consideration of what will be a realistic local facility does not conflict with the policy that a broadcast station must serve its entire service area. The 307 (b) Policy Statement's presumption goes to the question of an applicant's transmission service while the additional policy that an applicant must serve its entire service area relates to how an applicant will serve its reception area. Both inquiries have traditionally been made and have caused no conflict in the past. Cf. Northeast Broadcasting Inc. v. F.C.C., __U.S. App. D.C.__, 400 F.2d 749 (1968).

2. Appellant's Argument Re The Adequacy Of Existing Controls Lacks Merit. Tidewater argues (Br. pp.30-33) that the Commission's rules concerning main studio location, station identification, the programming portions of the application forms, and the threat of failure to renew a station's license are sufficient controls to insure realistic transmission service for a suburb and make the Suburban Policy Statement's presumption unnecessary. This is no more than an alternative plan offered by appellant to this Court in an effort to have the Court substitute its judgment for that of the Commission in the area of allocations, clearly a matter within the Commission's discretion. Guinan v. F.C.C., 111 U.S. App. D.C. 371, 374, 297 F.2d 782 (1961); see also Sunshine State Broadcasting Co., Inc. v. F.C.C., 114 U.S. App. D.C. 271, 314 F.2d 276 (1963); Sayger v. F.C.C., 114 U.S. App. D.C. 112, 312 F.2d 352 (1962); James R. Williams v. F.C.C., 120 U.S. App. D.C. 385, 347 F.2d 479 (1965).

Moreover, the Commission fully considered appellant's alternative plan to tie the responsibility of satisfying the needs of its designated community to the licensee but rejected it because "the allocation of a broadcast facility in a specific community is generally an enduring assignment, whereas the identity of the licensee may change from time to time . . ." (R. 1513-71).

3. There Is No Merit To Appellant's Vagueness Argument. Tidewater complains (Br. 33-40) that the Policy Statement does not set forth the "standards an applicant must meet and what quantum of evidence an applicant must present to successfully rebut the

presumption that its application must . . . be considered as one for the central city rather than for the specified community." The short answer to Tidewater's assertion is that the Commission in formulating its 307(b) Policy Statement specifically rejected the establishment of set standards for applications that propose suburban service. The Commission concluded that a rigid rule would produce undesirable results in too many cases, 2 F.C.C. 2d at 192. Instead, rather than relying on any of the approaches of the past, the Commission concluded that "a new approach to the suburban problem must be explored." The "objective evidence of an applicant's proposed coverage, which reflects the engineering factors of ground conductivity, frequency, and power, is sufficient to raise a question as to whether the proposal will be a realistic local transmission service for its specified community, . . ." 2 F.C.C. 2d at 192. The instances in which this inquiry will be directed are dictated by whether an applicant's proposed 5 mv/m contour will cover a community twice its own size and with a population of over 50,000. All applicants whose proposals fall in this category must establish that their applications are not realistically for the central city. If the presumption cannot be rebutted by information in the application, an evidentiary hearing is held to determine whether the application should be treated as a proposal for the specified community or for the central city. The "policy statement simply announces new guidelines to govern future hearings without establishing any substantive provisions for grant or denial of the applications," 2 F.C.C. 2d at 867. The Commission pointed

out that since the purpose of the presumption is to establish which community an applicant will realistically serve, "the type of evidence will necessarily differ, depending upon, among other variable factors, the applicant's proposed power, antenna directionalization and coverage," 2 F.C.C. 2d at 867. The type of showing expected of Tidewater was fully set out in the issues designated for exploration at the hearing (see page 3, supra).

Next Tidewater claims (Br. 36-37) that it is unable to determine what would be a sufficient showing to satisfy the Commission's presumption. For example, it points out that while the Commission has required that an applicant for a suburban community must demonstrate that there are available revenues in the community to support the station, it has not indicated how estimates of revenues could be obtained. Common sense would seem to dictate the answer to appellant's question. As the Commission explained, Tidewater made no attempt to contact advertisers in Smithfield or in the surrounding rural areas to determine whether they presently use radio advertising or whether they would be interested in advertising over a local radio station (R. 1434-G). Instead, it relied on the testimony of its president, Vernon H. Baker, whose estimates were based on the operation of a radio station in another community located on the eastern shore of Virginia. No attempt was made to show why this experience was relevant to Smithfield.

Moreover, as the Commission pointed out "there have been a substantial number of proceedings involving the Policy Statement which have resulted in grants of suburban applications . . . Thus, it is clear that not all applicants share Tidewater's alleged difficulty in understanding the intent and purpose of the Policy Statement. While we have attempted to set forth, simply and clearly, the scope of the problems and the nature of the evidence that would be considered pursuant to the Policy Statement, the particular factors that will be decisive in a specific proceeding can only be determined in the context of the facts and circumstances concerning that application since each allocation of a standard broadcast station must be considered in the light of the individual characteristics of the proposed evidence." (R. 1513-71) Northeast Broadcasting, Inc. v. F.C.C., __U.S. App. D.C.__, 400 F.2d 749 (1968); Jupiter Associates, Inc., 12 F.C.C. 2d 217 (1968); Donnelly C. Reeves, 6 F.C.C. 2d 531 (1967); Clay Broadcasters, Inc., 4 F.C.C. 2d 932 (1966); KEYZ Radio, Inc., 3 F.C.C. 2d 407 (1966); Jersey Cape Broadcasting Corp., 2 F.C.C. 2d 942 (1966); West Central Ohio Broadcasting, Inc., 3 F.C.C. 2d 223 (1966).

B. The 307(b) Policy Statement Was Adopted Pursuant To And Carries Out The Mandate Of The Communications Act To Provide Fair, Efficient, And Equitable Distribution Of Broadcast Service.

Tidewater asserts (Br. 41-50) that the Commission's inquiry pursuant to the 307(b) Policy Statement as to whether its application would provide a realistic local transmission service for Smithfield is inconsistent with the objectives of the Communications Act. This identical argument was presented to and fully considered by the Commission. In answer, the Commission pointed out (R. 1513-71 to 1513-72):

. . . the Policy Statement was adopted in pursuance of our mandate to provide fair, efficient, and equitable distribution of broadcast service. It is self-evident that the intent of the statute would be violated if large numbers of broadcast stations were allocated to the major metropolitan areas and to the exclusion of suburban communities and rural areas. The 307(b) Policy Statement was thus adopted so that we will have the means to determine whether a proposed allocation would provide a realistic local transmission service for its specified station location or merely another reception service for the entire metropolitan area.

In reply to this statement Tidewater asserts (Br. 44-46) that the Commission's conclusion, that it failed to rebut the Policy presumption and therefore must be treated as proposing service for the larger central city, is arbitrary in light of the fact that Tidewater could not possibly comply with the Commission's technical rules for a station assigned to Norfolk. In making this argument, appellant misconceives the purpose of the 307(b) Policy Statement. The prime objective of the Policy Statement is to

determine whether an applicant's suburban proposal will realistically serve its designated community. This determination is made independently of any other. It is only in the event that the applicant fails to establish that it will be a realistic transmission service for its designated community that the question of whether it complies with the technical rules for the larger community comes into issue. This latter determination becomes pertinent under the goal of the Policy Statement "to discourage any proposal that will be merely a sub-standard central city station," 2 F.C.C. 2d at 193. Thus, the Commission's conclusion here that Tidewater would not provide a realistic transmission service to Smithfield was properly made without considering whether or not Tidewater could meet the Commission's requirements for a Norfolk station. If Tidewater could meet these technical requirements, its application could be considered as a Norfolk proposal. But if it could not, that fact has no bearing whatsoever on the determination, already made, of whether its application, under the facts and circumstances of its particular case, in fact would serve the transmission needs of Smithfield.

Next, Tidewater argues that its 10,000 watts of non-directionalized power was necessary to provide efficient wide area rural coverage. But Tidewater's proposed station location was Smithfield, and the record does not establish that the relatively high power of 10,000 watts for a community of approximately 3,000 persons in a county with a total population of 17,164 persons is

necessary or efficient to serve that community and the surrounding rural areas. Indeed, as the Commission noted, "In spite of its high power, Tidewater's proposal would not even provide service for all of the five county area which it claims its proposal was designed to serve" (R. 1434-J n. 22). The Commission did find, however, that Tidewater would provide a new competitive service for approximately 736,000 persons throughout the Norfolk-Newport News metropolitan area. The Commission observed further that "the 10,000 watts which Tidewater proposes would make it more powerful during daytime hours than any standard broadcast station presently assigned to that metropolitan area" (R. 1434-K). To claim that it would be a wide area rural service in light of this metropolitan area coverage is simply not credible; its rural audience, even assuming its proposal would cover the five county area, would be less than ten percent of its total potential audience.^{8/}

The Commission simply did not find the record persuasive that Tidewater would not merely become another Norfolk station.^{9/} In the last analysis, Tidewater's proposal did not constitute an efficient allocation as required by Section 307(b) of the Act and amounted to nothing more than a sub-standard central city proposal.

^{8/} The Commission did not, as Tidewater contends, deny the Tidewater application on a comparison of the rural and metropolitan populations it would serve. On the contrary, the Commission rejected the Tidewater proposal because it failed to establish that it would realistically serve Smithfield.

^{9/} Even Tidewater later conceded before the Commission in seeking reconsideration that it could serve the same rural areas with 5,000 watts of power and by directionalizing. It also claimed it could have decreased its coverage of Norfolk in this manner.

II. THE COMMISSION PROPERLY CONCLUDED ON THE
FACTS OF RECORD THAT TIDEWATER FAILED
TO ESTABLISH THAT ITS PROPOSAL WAS
REALISTICALLY FOR SMITHFIELD.

As just discussed Tidewater's proposal for Springfield, Virginia seeks 10,000 watts of power for a community of approximately 3000 persons in a county with a total population of 17,164 persons. Its 10,000 watt proposal will provide a new competitive service for approximately 736,000 persons throughout the metropolitan area of Norfolk-Newport News, which would make it the most powerful daytime station presently serving this metropolitan area. While the Commission recognized in its 307(b) Policy Statement that smaller communities should be afforded an opportunity to obtain a local radio station, it also recognized, as we have repeatedly stressed herein, that, as power and coverage are increased to serve larger numbers of people in metropolitan areas, stations often tend to seek out national and regional advertisers and to identify themselves with the entire metropolitan area rather than with the particular needs of their specified communities.

It was for this reason incumbent upon Tidewater to demonstrate that its application would not in reality be the sub-standard central city proposal which its coverage of Norfolk indicated. The Commission noted in its decision that although it had said in its Policy Statement that applicants should propose only as much power as they might need to comply with the allocation rules, Tidewater made no showing as to what effect the use of lower power, directionalized operation, or a different transmitter site

would have had upon its proposal. Although Tidewater did argue that conductivity over salt water resulted in the extension of its signal, the Commission found and the evidence clearly establishes that, even if its 5 mv/m contour were projected only over land, the 10,000 watts of power which Tidewater proposes would still cause its 5 mv/m contour to penetrate the boundaries of Norfolk. "The facts in this proceeding," the Commission noted, "amply disclose the reasons why the 307(b) Policy Statement was based upon proposed coverage rather than upon the applicant's specified station location" (R. 1434-H).

In light of Tidewater's highly competitive coverage of the metropolitan area, despite the fact that Smithfield is located in a predominantly agricultural area, the Commission was "not persuaded that the record in this proceeding is sufficient to establish that Tidewater's proposal would not become merely another Norfolk station" (R. 1434-K). Although Smithfield does have separate and distinct programming needs and while the Commission observed that the record demonstrates that present service to Smithfield could undoubtedly be improved, "the needs of the relatively small population of Smithfield are not being ignored by the existing stations. This fact," the Commission concluded, "must also be considered in light of the meager showing which Tidewater has made with respect to potential revenues for its proposed station." In this regard, the Commission explained (R. 1434-K):

Since Tidewater's proposal, serving virtually all of the metropolitan area with at least some programming of general interest on the highest powered station in the area, would be extremely attractive to regional and national advertisers, we can give very little weight to Tidewater's unsupported assertion that Smithfield and Isle of Wight County businesses would provide adequate revenues to support its station. In view of the propensity of licensees with such power and coverage to identify themselves with the entire metropolitan area and to serve the needs of that overall area at the expense of the transmission needs of their specified communities, we are convinced that Tidewater's proposal must be treated as an application for a Norfolk station.

The Commission emphasized, however, that by the above statement it did not mean to suggest that Tidewater's proposal will inevitably become merely another Norfolk station, but simply meant that Tidewater had failed to make a sufficient showing to establish that "it will not eventually become such a station in view of its high power, its broad coverage of the metropolitan area, and its failure to demonstrate that revenues adequate to support the station are available in Smithfield and Isle of Wight County" (R. 1434-L).

Tidewater rejects these conclusions of the Commission and argues (Br. 55-64) that it would have weighed the facts differently and reached conclusions similar to those conclusions reached by the examiner and rejected by the Commission. Significantly, however, it makes little attempt to demonstrate that in the context of the Policy Statement the Commission improperly weighed the facts or that the Commission's conclusions were not reasonably based on the findings of fact. "So long as it observes all procedural requirements, considers the issues,

reaches reasoned conclusions, and renders reasoned judgments, courts cannot superimpose their opinions upon these matters." Tampa Times v. F.C.C., 97 U.S. App. D.C. 256, 259, 230 F.2d 224 (1956); Pinellas Broadcasting Co. v. F.C.C., 97 U.S. App. D.C. 236, 230 F.2d 204, cert. den. 350 U.S. 1007 (1956).

The appellant's recitation of the number of pages that the examiner's findings occupy in no way demonstrates that the Commission's contrary conclusions based on these findings are unreasonable. The Commission weighed the facts in the context of the entire case. For example, although Tidewater presented the written testimony of 26 civic leaders and other persons to establish that Smithfield has separate and distinct needs for a local transmission service, the Commission found that the needs of this relatively small community are not ignored by the existing stations.^{10/}

^{10/} Tidewater asks in its brief p. 57 "What stations? In what area?" The Commission gave the following detailed list in its decision (R. 1434-G):

Station WGH, Newport News, states that it reports the scores of Smithfield athletic events and other school activities, broadcasts public service announcements on behalf of Smithfield organizations when requested, and announces school openings and closings upon request of the Smithfield Superintendent of Schools. Station WRAP, Norfolk, states that it broadcasts information concerning weather and driving conditions in Smithfield and Isle of Wight County during severe weather conditions and that it carries public service announcements for groups and organizations from both Smithfield and Isle of Wight County. Station WTAR, Norfolk, also carries announcements concerning Smithfield public service organizations, school closings, and driving conditions and states that it will broadcast directly from Smithfield on special occasions. Finally, each of the three stations asserts that significant Smithfield news is reported on its local newscasts.

Tidewater in putting forth this argument would have the Commission weigh each of its showings in a vacuum, separate and apart from the other issues that were designated. However, the Policy Statement makes clear that such equality of consideration is not possible "because the type of evidence will necessarily differ, depending upon, among other variable factors, the applicant's proposed power, antenna directionalization and coverage." 2 F.C.C. 2d at 867. Tidewater has not demonstrated that its proposal for Smithfield, in light of all the other evidence, will provide a realistic local transmission to service the needs of that community. ^{11 /}

11/ An additional argument is made (Br. 65-69) by Tidewater that the decision in regard to its application and the Commission's decision in Monroeville Broadcasting Company, 12 F.C.C. 2d 359 (1968), are incompatible. Substantially the same argument was made to the Commission; its reply was as follows (R. 1513-69 to 1513-70):

Initially, we are convinced that there is no inconsistency between our Decision in Monroeville, supra. While Tidewater has noted some dissimilarities in the two Decisions favorable to its application, Tidewater has ignored the differences which were the fundamental reasons for the contrasting results in these two Decisions. As we stated in both Decisions, the amount of evidence required to overcome the presumption of the 307(b) Policy Statement varies according to, among other factors, the applicant's proposed power, directionalization and coverage. In Monroeville, the prevailing applicant proposed 250 watts of power, nondirectional operation, and limited coverage of the metropolitan area, whereas Tidewater's proposal would use 10,000 watts of power to serve virtually the entire metropolitan area. Although the geographic position of the applicants' specified station locations was considered in both Decisions, the importance of this factor, in each instance, was substantially diminished in view of the crucial differences in the applicants' proposed power and coverage of their respective metropolitan areas. Under these circumstances, it is clear that the grant of the Monroeville application was not in any way inconsistent with the denial of Tidewater's application in this proceeding.

III. THE COMMISSION PROPERLY DENIED TIDEWATER'S PETITION FOR LEAVE TO AMEND AS BEING NOTHING MORE THAN AN ATTEMPT TO MAKE AN IMPROVED SHOWING AFTER THE CLOSE OF THE HEARING.

In view of the long history of this case, the Commission concluded that the public interest would be served by permitting both Fischer and Tidewater to file new proposals without waiting a year as would ordinarily be required by Section 1.519 of its Rules, 47 CFR 1.519. Such application, the Commission held, would have to conform to the essential confines of the present proposals and with the technical provisions for their specified station locations. Additionally, the Commission provided that, in order that the most suitable proposal for this area might be selected, other interested parties would also be permitted to file similar applications.

In a Petition for Rehearing, Tidewater requested that it be permitted to amend its present application, rather than file a new one. This, of course, would retain for it its umbrella of protection. Tidewater argued before the Commission in an effort to obtain reconsideration, and renews its argument here (Br. 51-54), that it was not until the Commission released its decision that it was placed on notice that it could be penalized because of its failure to amend or to submit an alternative to its proposed omni-directional operation with 10,000 watts of power. This argument is patently specious. There was never any doubt that the remand hearing was designated because of the fact that appellant's highly competitive signal (i.e., its omni-directional, 10,000 watts of power) over the metropolitan areas of Norfolk and Newport News

invoked the Policy Statement presumption. And reported Commission decisions left equally little doubt that timely amendments would be allowed to reduce power in order to avoid the impact of the Policy Statement. See Dennis A. Sleighter and Willard D. Sleighter, 3 F.C.C. 2d 646 (1966), where the Review Board noted that good cause was presented for allowing an amendment because the need to make such amendment could not have been foreseen before adoption of the Policy Statement. See also KWEN Broadcasting Co., 3 F.C.C. 2d 958 (1966).^{12/}

Thus, in denying Tidewater's request for leave to amend while remaining in hearing status, the Commission properly stated (R. 1513-68):

In spite of the Board's clear statement that applicants, who were already in hearing when the Policy Statement was adopted, would be permitted to amend their proposals to avoid a further hearing, Tidewater waited for nearly two years and until after we had adopted our final Decision in this proceeding to suggest that its proposal could be modified. Under these circumstances, it is clear that the adoption of the Policy Statement is not what prompted Tidewater's present request, but rather it is our Decision in this proceeding, and we have consistently held that an applicant will not be given a further opportunity to make an improved showing that its application should be granted, when that showing could have been made during the course of the hearing. See, for example, Louis Adelman, 29 F.C.C. 1223, 18 RR 106a (1960) aff'd sub nom. Guinan v. Federal Communications Commission, 297 F.2d 782, 22 RR 2026 (1961).

^{12/} Appellant's reliance on Rodale Press, Inc. v. F.T.C. at Brief pages 53-54 is misplaced. Unlike Rodale Press, Inc., Tidewater was fully informed of the issues which elicited the evidence upon which the Commission premised its decision.

CONCLUSION

For all of the above reasons, we submit that the orders of
the Commission here appealed from must be affirmed.^{13/}

Respectfully submitted,

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Federal Communications Commission
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February 7, 1969.

^{13/} Finally, we point out only in passing that the appellant has provided the Court with extensive discussion of past Commission policies and cases which have no bearing on the merits of this appeal. Our failure to discuss appellant's opinions results only from their irrelevancy to this appeal and does not reflect agreement therewith.

REPLY BRIEF FOR APPELLANT

IN THE UNITED STATES COURT OF APPEALS
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Appellant

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FEDERAL COMMUNICATIONS COMMISSION

Appellee

APPEAL FROM A DECISION OF THE
FEDERAL COMMUNICATIONS COMMISSION

REPLY BRIEF FOR APPELLANT

United States Court of Appeals
for the District of Columbia Circuit

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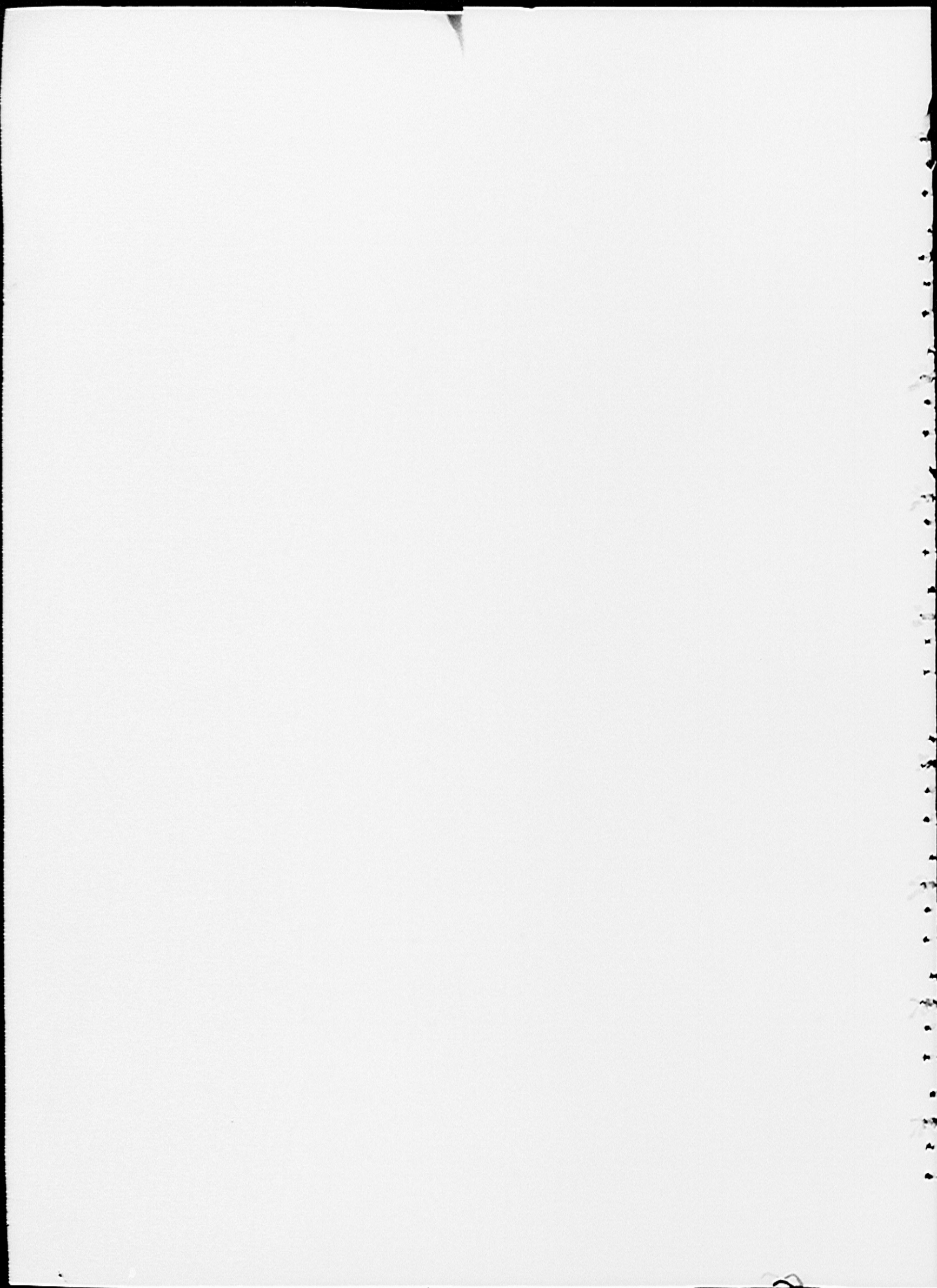


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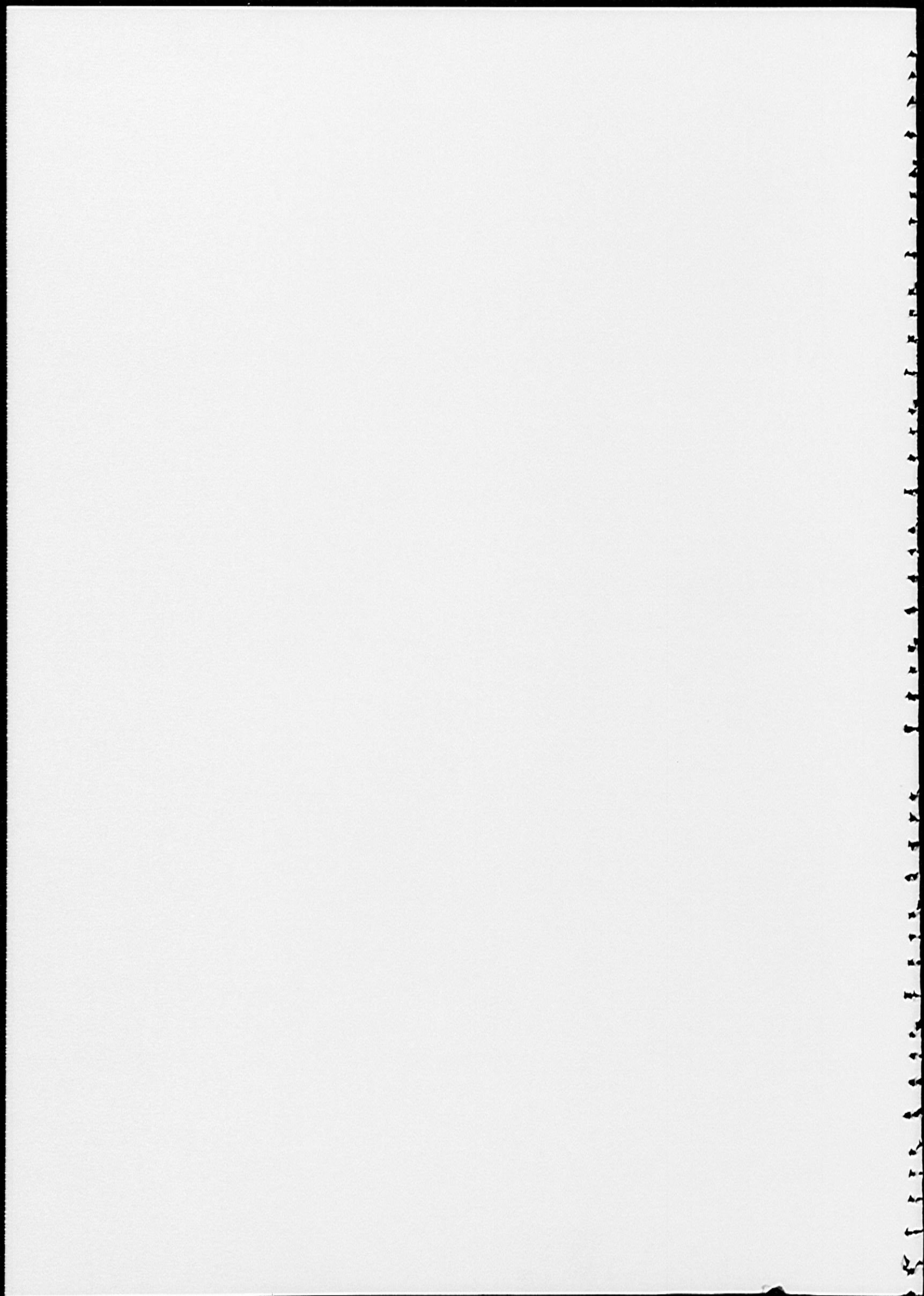
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COUNTERSTATEMENT OF THE CASE

The Commission's counterstatement of the case contains a most significant statement of position. On page 3, the Commission states that "The only part of the record pertinent to this appeal derives from this remand hearing on the Policy presumption". The Commission does not even mention the fact that this proceeding has been underway for almost ten years,

and that two separate hearings were held, two separate initial decisions were issued by the Examiner, and oral argument was held before the Commission en banc before the 307(b) Sub-urban Policy^{1/} was even adopted.

The first of the two issues in the remand hearing on the Policy presumption is as follows:

(a) To determine whether each of the proposals will realistically provide a local transmission facility for its specified location or for another larger community, in light of all of the relevant evidence, including, but not necessarily limited to, the showing with respect to:

(Emphasis supplied) (A. 69)

The Commission summarizes the four subissues as follows:

- (1) the separate and distinct needs of its designated community;
- (2) how those needs are presently met by existing stations;
- (3) how unsatisfied needs will be met by the proposed station;
- (4) whether the revenues available in the suburban community are adequate to support the proposed station.

(Appellee's Brief, p. 3)

^{1/} Policy Statement On Section 307(b) Considerations For Standard Broadcast Facilities Involving Suburban Communities, 2 FCC 2d 190, 6 Pike & Fischer RR 2d (1965).

One of Tidewater's principal contentions has been that the Commission ignored extensive evidence of the first two hearings, as reflected by the extensive findings of fact of the Initial and first Supplemental Initial Decisions, when it concluded that Tidewater had not presented sufficient evidence to rebut the presumption that it would turn its back on Smithfield and the large rural area from 20 to 58 miles west and southwest of Norfolk, in which more than 230,000 persons reside on farms and in small communities, and become a Norfolk station (Appellant's Brief, p. 53). Now that the Commission has confirmed that only evidence presented at the third hearing -- that held pursuant to the 307(b) Suburban Policy and related issues -- was considered by the Commission as relevant when it reached its Decision, this case should be remanded to the Commission with instructions that, as stated in Issue (a), "all of the relevant evidence, including, but not necessarily limited to" the evidence developed under the four subissues, ^{2/} must be considered.

^{2/} It is respectfully submitted that the Court should direct the Commission to clearly show in a revised Decision just what evidence actually was considered and what evidence was given no weight as irrelevant. Under the circumstances, the usual self-serving declarations of the Commission such as "all of the evidence has been considered" and "in light of the entire record," should not be permitted.

ARGUMENT

Tidewater's complaint may be briefly summarized, and perhaps oversimplified, as follows:

1. Even though Tidewater's proposals to provide the first local and readily accessible station and an agricultural program service to a large rural and agricultural area fully satisfy every single rule of the Commission and the basic objectives of Section 307(b) of the Communications Act ^{3/}, its application was denied under a policy which the Commission concedes is vague and variable only because the Commission was not convinced the proposals were made in good faith and would be fulfilled.

2. In denying Tidewater's application, the Commission either ignored or gave no weight to an extremely large volume of relevant and material evidence, gave undue and distorted weight to other evidence, and failed to follow the precedent of another similar case decided the same day.

^{3/} Section 307(b) of the Communications Act of 1934, as amended, 47 U.S.C. §307(b).

May we be so bold as to suggest that a brief review of fundamentals is in order and will lead to the correct decision in this appeal.

The basic objective of the Communications Act is to provide "... so far as possible, to all of the people of the United States, a rapid, efficient, nationwide and worldwide wire and radio communications service ...".^{4/} Broadcasting is an integral part of the nationwide radio communications service.

Section 307(b)^{5/} was enacted in 1936 because the quota system of allocation resulted in a concentration of stations in the major cities and heavily populated areas at the expense of the smaller communities and rural areas.^{6/} In Northwestern

^{4/} Section 1 of the Communications Act of 1934, as amended, 47 U.S.C. § 151.

^{5/} Section 307(b) is as follows:

In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several states and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

^{6/} An excellent discussion of the legislative history and objectives of Section 307(b) may be found in Newark Broadcasting Corporation, 3 Pike & Fischer RR 839, 853-854 (1947).

Ohio Broadcasting Corp., 3 Pike & Fischer RR 1945, 1954 (1948), the Commission stated that the mandate of the Communications Act requires "the Commission to provide the most widespread and effective broadcast service possible to this country."

The term "radio service" in Section 307(b) means both transmission service and reception service. In a 1950 report, Origination Point of Programs of Broadcast Stations, Docket No. 8747, 1 Pike & Fischer RR 91:465, 91:466, the Commission said:

We have consistently held that the term "radio service" as used in Sec. 307(b) comprehends both transmission and reception service. Transmission service is the opportunity which a radio station provides for the development and expression of local interest, ideas and talents and for the production of radio programs of special interest to a particular community. Reception service on the other hand is merely the presence in any area of a listenable radio signal. It is the location of the studio rather than the transmitter which is of particular significance in connection with transmission service. A station often provides service to areas at a considerable distance from its transmitter but a station cannot serve as a medium of local self expression unless it provides a reasonably accessible studio for the origination of local programs.

(Emphasis supplied)

The word "communities", as used in Section 307(b), does not mean the area within the geographical boundaries of a city, village or town, but means a grouping of persons with

common interests. "The corporate status of a community is but one factor to be weighed in any 307(b) decision."

Mercer Broadcasting Company, 13 Pike & Fischer RR 891, 909 (1957). In Huntington Broadcasting Co. v. Federal Communications Commission, 89 U.S. App. D.C. 222, 191 F. 2d 333 (1951), this Court affirmed a decision of the Commission which held that a community, for Section 307(b) purposes, may encompass more than the area within the corporate limits of the principal city named in the application as the specified station location.^{7/}

The area for which a broadcast station provides a transmission service is not fixed by the terms of its license or by rule and cannot be precisely defined because of many variables such as accessibility by highway and the proximity or remoteness of other stations.^{8/}

^{7/} The case before the Commission was Huntington Broadcasting Co., 5 Pike & Fischer RR 721 (1950), rehearing denied, 6 Pike & Fischer RR 569 (1950).

^{8/} Section 73.30(a)(2) of the Commission's Rules, 47 CFR § 73.30(a)(2), provides that the main studios of a standard broadcast station :may be located at the transmitter site whether or not the transmitter site is in the place the station is located." Here in

The daytime primary service area of a station, i.e., the area receiving reception service, varies directly with power.

A broadcast station may, and many stations do, provide a specialized program service directed primarily to only a portion of the listeners in its service area, i.e., those receiving a reception service.^{9/}

These fundamentals will be referred to from time to time in the following reply to the Commission's arguments.

8/ (Cont'd. from p. 7)

Washington, Station WWDC has its main studios at its transmitter site in Montgomery County, Maryland, near Wheaton, even though the station is licensed to Washington. Obviously, its main studios are far more readily accessible from many sections of Montgomery County than from areas of Washington. Does not WWDC also provide a transmission service for parts of Montgomery County?

9/ Here in the Washington area, some stations are programmed primarily for Negroes, some for the teen-agers, and some for those who like "good music." Two stations specialize in news.

I

THE COMMISSION CONTINUES TO IGNORE
THE BENEFITS WHICH WOULD FLOW FROM
A GRANT OF TIDEWATER'S APPLICATION

The objectives of Tidewater's proposal are twofold. The first is to provide a transmission service -- a readily accessible outlet for local self-expression -- to Smithfield and the surrounding rural areas and small communities which are closer and more readily accessible to Smithfield than to any other community with a broadcast station.^{10/} The second is to provide primarily a specialized agricultural service to rural and agricultural areas within 40 miles of Smithfield.^{11/}

^{10/} The only stations in the five county area to the west and southwest of Norfolk which Tidewater proposes to serve are WLPM at Suffolk, 19 miles south of Smithfield, and WYSR at Franklin, 26 miles southwest of Smithfield (A. 5). The closest station to the west and south of the James River is at Petersburg, 45 miles west of Smithfield (Tidewater Ex. 1, pp. 5, 9-11).

^{11/} The interference-free 0.5 millivolt per meter contour, the outer limit of Tidewater's proposed primary service in rural areas -- reception service -- falls no closer than 35 miles from Smithfield and as far as 105 miles from Smithfield (A. 57).

A. The Commission Ignores The Inescapable Fact That Tidewater's Station Would Provide The First Readily Accessible Station For An Area of Substantial Size

Obviously, Tidewater would provide a transmission service -- a readily accessible outlet for local self-expression -- for all portions of the five county area which are less than half way between Smithfield and Suffolk and Smithfield and Franklin. Surely, distances of nine to twelve miles are not great, particularly when the area is all rural and there are no toll bridges to cross.

Even though it is well established that a station may and does provide a transmission service beyond the geographical boundaries of the community to which it is licensed -- the Commission's Rules even permit such service --, the Commission persists in arguing that Tidewater would provide transmission service only to Smithfield, which has a population of 3,010 (Appellee's Brief, pp. 5, 16, 18).

In addition, the Commission argues that ". . . Tidewater failed to show that its extensive power was necessary to provide a local service for Smithfield" (Appellee's Brief, pp. 5-6). The Commission is correct. Tidewater was not proposing a "local service for Smithfield," but a wide area service for

a large rural area from a station centrally located at Smithfield, the County Seat of Isle of Wight County. Any reduction in power would greatly reduce the rural service area. Yet, this was one of a number of primary reasons why Tidewater's application was denied. It was arbitrary and capricious for the Commission to fault Tidewater for not proposing an inferior and less efficient service, particularly when Section 307(b) of the Act requires the Commission to insure a "fair, efficient, and equitable distribution of radio service."

For these reasons alone, we respectfully submit that the Decision should be set aside and this case remanded to the Commission.

B. The Commission Ignores The Inescapable Fact That Tidewater's Station Would Provide An Agricultural Program Service For More Than 280,000 Non-Metropolitan and Rural Persons

Tidewater's proposed station would render interference-free primary service -- reception service -- to 1,016,238 persons in an area of 6,584 square miles ^{12/} (A. 77).

^{12/} Footnote 5 on A. 77 states that the population and area would be reduced slightly if a pending application at Catonsville, Maryland, should be granted. That application, File No. BP-16105, was dismissed on September 14, 1967.

Both in paragraph 9 of its Decision (A. 112) and in its brief, the Commission states that Tidewater's proposed station "would provide a new competitive service for approximately 736,000 persons throughout the Norfolk-Newport News metropolitan area"^{13/} (Appellee's Brief, p. 17). Subtracting 736,000 from 1,016,238, leaves 280,238 persons outside the Norfolk-Newport News metropolitan area who would receive service from the proposed station. Hundreds of broadcast stations throughout the United States serve far fewer persons. In fact, that total is only slightly less than the population of Nevada (285,278). But nowhere has the Commission considered

^{13/} Although Tidewater has been unable to determine the source of that figure -- the 1960 United States Census does not even list a "Norfolk-Newport News metropolitan area" --, it will be assumed for the purpose of this discussion to be correct. However, under the 1960 Census, a Standard Metropolitan Statistical Area is made up only of one or more entire counties. Unless a county is entirely urban -- densely populated -- it will have some rural areas. Thus, the use of metropolitan areas is misleading. The Urbanized Areas as defined by the Bureau of the Census are based upon population density and are used for computing the coverage of standard (AM) broadcast stations. The 1960 Census gives the population of the Norfolk-Portsmouth Urbanized Area as 507,825, and the Newport News-Hampton Urbanized Area as 208,874. The total of 716,899 is somewhat less than the 736,000 figure used by the Commission. This illustrates the pitfalls of relying upon statistics.

the benefits to those 280,000 persons from the proposed operation.

At no time has the Commission weighed the advantages of a new, unique, and non-competitive service to 280,000 persons outside the Norfolk-Newport News metropolitan area and the 299,413 persons outside the Urbanized Area against the disadvantages of providing a "new competitive service for 736,000 persons throughout the Norfolk-Newport News metropolitan area." For this reason alone, the Decision should be set aside.

But that is not all of the erroneous and specious arguments of the Commission. Later on page 17, the Commission argues: "To claim that it would be a wide area rural service in light of this metropolitan area coverage is simply not credible; its rural audience, even assuming its proposal would cover the five county area, would be less than ten percent of its total potential audience" (Appellee's Brief, p. 17). Once again, Tidewater does not know the source of that statement. The facts show as follows:

- (1) The distance to the outer limits of the proposed primary service area -- the interference-free or 0.5 mv/m contour -- varies from a minimum of 35 miles to a maximum of

105 miles (A. 57).

- (2) The "less than ten percent" used by the Commission appears to actually be 27.6% (Computations).
- (3) At least some of the metropolitan area coverage arises from the unusually high conductivity and excellent propagation characteristics of the salt waterpath between Tidewater's transmitter site and Norfolk and the metropolitan area (A. 114).

Is not service to areas from 35 to 105 miles from the transmitter and covering a land area of 6,584 square miles a wide area service? The Commission obviously has forgotten that rural areas are less densely populated than metropolitan areas. Is not every person living on a farm or in a small town just as much entitled to at least one local broadcast service as the big city dweller? Section 307(b) says that he is. To conclude that a wide area service would not be provided merely because of the signal strength over a nearby city and metropolitan area is most arbitrary and capricious.

II

THE COMMISSION HAS FAILED TO SHOW
HOW RECEPTION SERVICE FROM STATIONS
IN NORFOLK SATISFY THE NEEDS OF
SMITHFIELD FOR A TRANSMISSION SERVICE

The Commission, in paragraph 10 of its Decision, concluded that "written interrogatories by several of the stations in the area around Smithfield demonstrate that the needs of that community had not been completely ignored" (A. 113). There followed reference to three stations, WGH, Newport News, and WRAP and WTAR, Norfolk. Tidewater contended that the conclusions were erroneous, that much relevant and material evidence had been ignored, and that other evidence had been distorted (Appellant's Brief, pp. 56-60). The Commission's answer is that Tidewater made "little attempt to demonstrate that in the context of the Policy Statement the Commission improperly weighed the facts or that the Commission's conclusions were not reasonably based on the findings of fact" (Appellee's Brief, p. 20).

The answer is very simple. If Tidewater's proposed station cannot provide a transmission service beyond the geographical boundaries of Smithfield, neither can WGH provide a transmission service beyond the boundaries of

Newport News nor can WRAP and WTAR provide a transmission service beyond the boundaries of Norfolk. The Commission "cannot have its cake and eat it" at the same time.

Even if WGH, WRAP and WTAR can and do provide a transmission service beyond the boundaries of their communities, they cannot, by any stretch of the imagination, be said to be reasonably accessible from the Smithfield area. Newport News is 19 miles from Smithfield over a toll bridge. Norfolk is 23 miles from Smithfield over a toll bridge and through a toll tunnel (A. 8).

The Commission gave great weight to the erroneous conclusion concerning the service of WGH, WRAP and WTAR. In so doing, it not only ignored relevant and material evidence but also failed to recognize the distinction between transmission and reception service. Even more significant is the Commission's failure to recognize that its handling of the facts, in light of its consideration of Tidewater's community and proposed transmission service, created a dilemma from which there is no escape.

For this reason alone, the Decision should be set aside.

III

THE DENIAL OF TIDEWATER'S APPLICATION
BECAUSE OF THE POSSIBILITY THAT NATIONAL
AND REGIONAL ADVERTISING MIGHT BE AC-
CEPTED WAS ARBITRARY AND CAPRICIOUS

The evolution of the 307(b) Suburban Policy is described at considerable length in Tidewater's brief, beginning on page 17 and continuing through page 25. Most significantly, every single decision of the Commission and each of the two decisions of this Court which preceded the consideration and adoption of the policy involved at least two mutually exclusive applications, at least one for a community within a metropolitan area and sufficiently close to the central city of the metropolitan area as to provide primary service^{14/} to all or portions of the central city.^{15/}

^{14/} A signal having a strength of at least 2 millivolts per meter.

^{15/} The Memorandum Opinion and Order, released July 9, 1965, Monroeville Broadcasting Company, 1 FCC 2d 319, 5 Pike & Fischer RR 2d 547 (1965), initiated the proceeding which led to the adoption of the 307(b) Suburban Policy, and was issued as the direct result of the remand by this Court in Miners Broadcasting Service, Inc. v. FCC, 121 U.S. App. D.C. 222, 349 F.2d 199 (1965). In Miners, this Court held that the Commission had failed to follow the "exceptional" rule approved by this Court in Huntington Broadcasting Co. v. FCC, 89 U.S. App. D.C. 222, 192 F. 2d 33 (1951), and had created, rather than destroyed, inequities. The following decisions of the Commission

Every single case involved the application of Section 307(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 307(b), to resolve, if possible, the conflicts between applications for different communities.

15/ (Cont'd from p. 17)

were the only ones listed in that Memorandum Opinion and Order and, with but one exception, each involved at least two mutually exclusive applications, at least one of which was for a community within and close to the central city of a metropolitan area: Huntington Broadcasting Co., 5 Pike & Fischer RR 721 (1950), reconsideration denied, 6 Pike & Fischer RR 569 (1950); Radio Crawfordsville, Inc., 34 FCC 996, 25 Pike & Fischer RR 533 (1963), reconsideration denied, 35 FCC 438, 25 Pike & Fischer RR 1001 (1963); Speidel Broadcasting Corp. of Ohio, 35 FCC 74, 25 Pike & Fischer RR 523 (1963), reconsideration denied, 35 FCC 755, 1 Pike & Fischer RR 2d 726 (1963); Monroeville Broadcasting Co., 35 FCC 657, 1 Pike & Fischer RR 2d 607 (1963), reconsideration denied, 36 FCC 296, 1 Pike & Fischer RR 2d 993 (1964); Burlington Broadcasting Co., 34 FCC 1135, 25 Pike & Fischer RR 633 (1963); Massilon Broadcasting Company, 36 FCC 809, 2 Pike & Fischer RR 2d 409 (1964); Seven Locks Broadcasting Co., 37 FCC 82, 3 Pike & Fischer RR 2d 25 (1964). The one exception was Rockland Broadcasting Company, 37 FCC 303, 2 Pike & Fischer RR 2d 39 (1964), reconsideration denied, 36 FCC 1510, 2 Pike & Fischer RR 2d 820 (1964), affirmed, sub. nom. Dacre v. FCC, 122 U.S. App. D.C. 171, 352 F.2d 647 (1965), which involved mutually exclusive applications for communities within a metropolitan area but some distance from the central city. A copy of the Memorandum Opinion and Order initiating the proceeding which led to the adoption of the 307(b) Suburban Policy is attached to Tidewater's brief as Appendix A.

The Commission has pointedly ignored the evolution and legislative history of the 307(b) Suburban Policy in its brief. In fact, it does not even mention a single one of the many decisions upon which the Commission requested comments in the proceeding which led to the adoption of the policy statement^{16/}, not even the two decisions of this Court.^{17/} Nor does the Commission, in its brief, give any consideration to the policy statement as a whole. Instead, it merely paraphrases, on pages 7 and 9 of its brief, just one sentence from the entire policy statement:

8. . . . Our experience compels us to conclude that as their power and coverage are increased to serve larger numbers of persons, stations in metropolitan areas often tend to seek out national and regional advertisers and to identify themselves with the entire metropolitan area rather than with the particular needs of their specified communities. . . . (Appellant's Brief, Appendix B, pp. 3-4) (Emphasis supplied).

^{16/} The proceeding which led to the adoption of the 307(b) Suburban Policy was initiated by the Memorandum Opinion and Order in Monroeville which appears as Appendix A to Appellant's brief. The Commission's decisions also are listed in footnote 7, above.

^{17/} The two decisions of this Court are Huntington Broadcasting Co. v. FCC, supra, and Miners Broadcasting Service, Inc. v. FCC, supra.

There is not one iota of evidence, or even any significant reference, in any of the listed cases which led to the adoption of the 307(b) Suburban Policy that the seeking out and acceptance of national and regional advertising by a suburban station created any problems.

As noted before, Tidewater proposes an agricultural program service to a large rural area and population. It expects some of its advertisers to be the manufacturers of farm implements such as tractors, plows, harrows and harvesters, and other advertisers to be manufacturers of fertilizers, weed killers and insecticides. Such advertisers most certainly will be national advertisers. It also expects advertising from livestock yards and meat packers, particularly in the area made famous by the Smithfield Ham. Those advertisers will be classified as regional advertisers.

Where is the evil of acceptance of such advertising?

What is the relationship between the advertising carried by a station and the "fair, efficient, and equitable distribution of radio service" mandate of Section 307(b) of the Act?

None has been shown!

Nor is there any requirement by any statute, rule or policy that a broadcast station must receive sufficient revenues from the community to which it is licensed to sustain its operation. Yet the Commission continues to belabor the matter of revenues ^{18/} (Appellee's Brief, p. 13).

The simple, inescapable fact is that there is not even a remote relationship between the advertising accepted by a station and Section 307(b). Nor is there any relationship between the source of revenues and Section 307(b).

Seldom, if ever, has a more arbitrary and capricious reason been given for denying an application which even today fully satisfies every applicable rule of the Commission and every applicable section of the Communications Act.

18/ At the bottom of page 13 of its brief, the Commission states that no attempt was made to show why Dr. Baker's experience in the operation of Station WESR was relevant to Smithfield. The following finding in footnote 12 of page 15 of the Second Supplemental Initial Decision was overlooked by the Commission:

Baker's experience has included operation of stations in small communities, including Station WESR at Tasley, on the Eastern Shore of Virginia. The Tasley station had first-year revenues of about \$80,000 and by 1965 its revenues had increased to about \$115,000. The population of the Tasley community is less than that of Smithfield and the interference-free population of Station WESR is many fold less than that within the operation proposed by Tidewater (A. 87).

V

CONCLUSION

No useful purpose will be served by a further dissection of the Commission's arguments. The foregoing discussion, coupled with the arguments in Tidewater's brief, conclusively prove that there is no reasonable relationship between the objectives of Sections 1 and 307(b) of the Communications Act and the 307(b) Suburban Policy.

A remand is respectfully requested.

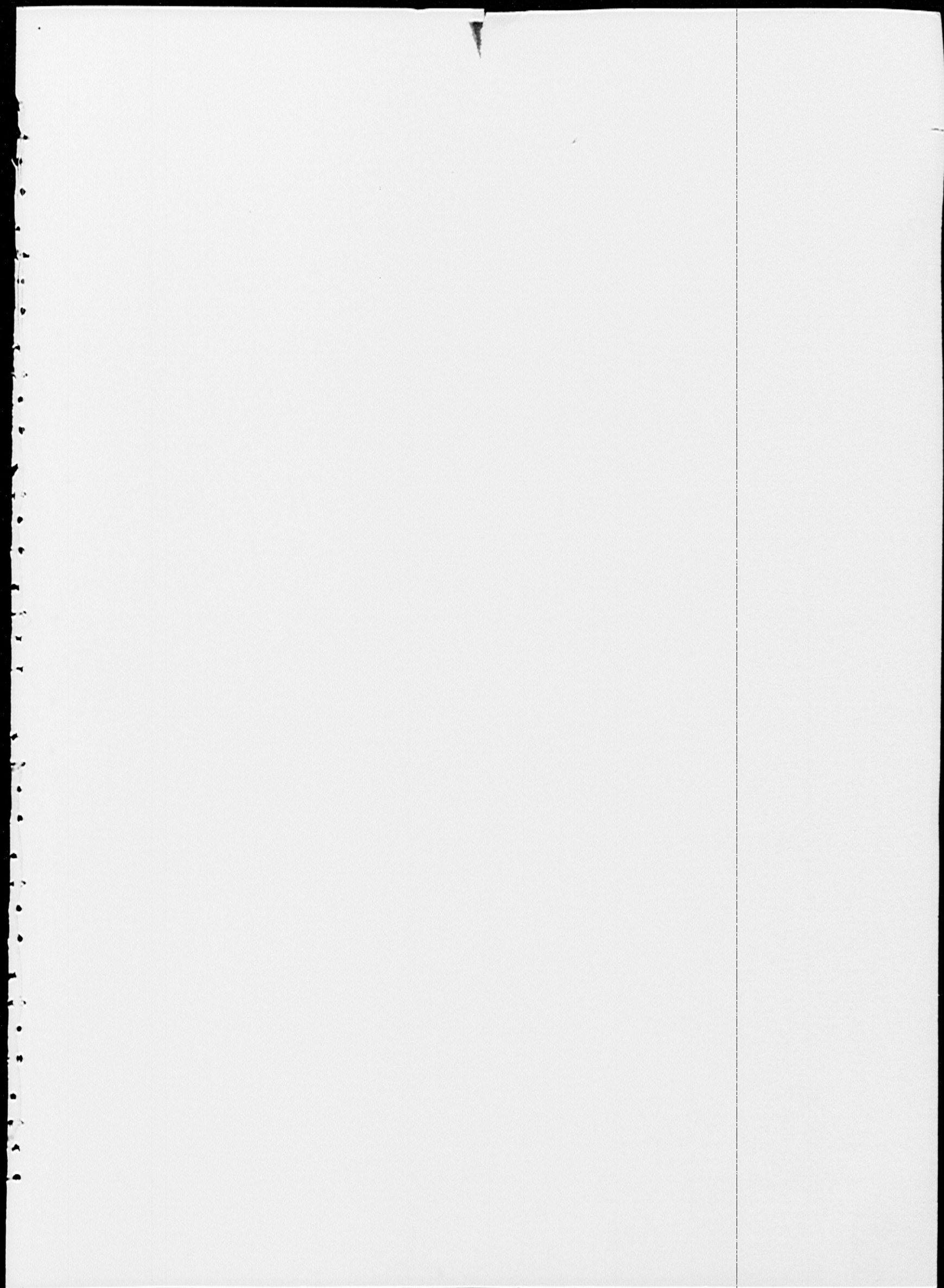
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March 17, 1969



BRIEF FOR APPELLANT

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,400

THE TIDEWATER BROADCASTING COMPANY, INCORPORATED

Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION

Appellee

APPEAL FROM A DECISION OF THE
FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR APPELLANT

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STATEMENT OF THE ISSUES

This case has not previously been before the Court. ^{1/}

^{1/} An appeal of Edwin R. Fischer from the denial of his application by the same Decision from which this appeal is taken is pending in Case No. 21,942.



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STATEMENT OF THE ISSUES

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1/ An appeal of Edwin R. Fischer from the denial of his application by the same Decision from which this appeal is taken is pending in Case No. 21,942.

The parties have not entered into a stipulation of the issues presented in this appeal, but have agreed informally that each may submit its own statement. In the opinion of the Appellant, the following issues are presented:

1. Is the 307(b) Suburban Policy, under which the Commission may deny an applicant which fully satisfies every applicable rule of the Commission, lawful and enforceable?
2. Did the Commission err in refusing to afford Tidewater the opportunity to show the possibility of operation with different facilities than those specified in the application?
3. In denying Tidewater's application did the Commission fully and fairly consider and apply the evidence as summarized in the findings of fact adopted by the Commission?
4. Is the Decision compatible with the decision adopted the same day by the Commission in the companion case of Monroeville Broadcasting Company?
5. Was the conclusion that denial of Tidewater's application would provide a fair, efficient, and equitable distribution of radio service and would serve the public interest, convenience and necessity, arbitrary and capricious?

STATEMENT OF THE CASE

This is an appeal, pursuant to Section 402(b) of the Communications Act of 1934, as amended, 47 U.S.C. §402(b), from a Decision of the Federal Communications Commission, released April 16, 1968, which denied the application of The Tidewater Broadcasting Company, Incorporated, for a construction permit for a new and the first standard (AM) broadcast station at Smithfield, Virginia (A. 107-122), and from a Memorandum Opinion and Order of the Commission, released September 16, 1968, which denied Tidewater's petition for rehearing. (A. 123-130.) By the same Decision, the Commission also denied the mutually exclusive application of Edwin R. Fischer for a construction permit for a new and the third broadcast station at Newport News, Virginia.^{2/} Both applications were denied under the Policy Statement On Section 307(b) Considerations For Standard Broadcast Facilities Involving Suburban Communities, 2 Federal Communications Commission Reports, Second Series 190, 6 Pike & Fischer Radio Regulations, Second Series 1901 (hereinafter referred to as the 307(b) Suburban Policy), which had been adopted by the

^{2/} As noted above, an appeal by Fischer is before this Court in Case No. 21,942.

Commission December 22, 1965, more than six and a half years after the applications had been filed and more than six years after they had been designated for hearing. The Decision was preceded by three separate hearings and by the issuance of three separate initial decisions by the Hearing Examiner, each one proposing the grant of Tidewater's application and the denial of Fischer's mutually exclusive application.^{3/}

Tidewater's application, which specified daytime only operation as a Class II station on the clear channel of 940 kilohertz, was filed with the Commission on February 2, 1959. Because the primary objective was to provide an agricultural program service to the tens of thousands of farmers and farm families in a five-county area generally west of Norfolk, Virginia, and south of the James River,^{4/} a power of 10 kilowatts and a non-directional antenna was proposed.^{5/}

^{3/} The three initial decisions were the Initial Decision of Hearing Examiner Elizabeth C. Smith, released July 11, 1961 (A. 1-47); the Supplemental Initial Decision of Elizabeth C. Smith, released April 19, 1965 (A. 49-66); and the Second Supplemental Initial Decision of Hearing Examiner Elizabeth C. Smith, released January 17, 1967 (A. 73-105).

^{4/} The counties are Isle of Wight, Surry, Sussex, Nansemond and Southampton.

^{5/} Class II stations are intended to provide wide area coverage and may operate with a maximum power of 50 kilowatts. The assignment of a station at Richmond, Virginia, on the adjacent channel of 950 kilohertz and the pendency of applications in the Baltimore, Maryland, area, proposing to operate on 940 kilohertz made it impossible to propose a power in excess of 10 kilowatts at Smithfield.

Smithfield, with a population of 3,010 persons within its corporate limits, was selected as the station location because it is the county seat and largest urban center of Isle of Wight County, is an agricultural processing and marketing center,^{6/} and is close to the geographical center of the five-county area sought to be served. Smithfield and the entire five-county area lie outside all urbanized and metropolitan areas. Intervening bodies of water make airline distances from Smithfield to other cities in the general area of little significance. From Smithfield, the highway distances are as follows: to Newport News, 19 miles over the James River toll bridge; to Portsmouth, 21 miles over a toll bridge; to Norfolk, 23 miles via a toll bridge and tunnel; and to Suffolk, 19 miles.^{7/} In no sense of the word is Smithfield a suburb of any of those cities.

The only broadcast stations^{8/} in the five-county area are one station at Suffolk and one station at Franklin,

6/ The town is well known for being the home of the Smithfield Ham.

7/ The facts in this paragraph are from paragraph 11 and 13 of the first Initial Decision (A. 7-8) except for the population of Smithfield, which is from paragraph 12 of the findings of fact of the Second Supplemental Initial Decision. (A. 76).

8/ All references to broadcast stations in this brief are to standard (AM) broadcast stations. The record contains no evidence concerning frequency modulation (FM) and television (TV) broadcast stations except that none are located in Smithfield.

the latter 26 miles southwest of Smithfield. Neither station provides a primary service signal^{9/} to Smithfield. The only stations which provide primary service signals to Smithfield are two in Norfolk and two in Newport News. The only daily newspaper published in the five-county area is published at Suffolk.^{10/}

Terrain characteristics of the area about Smithfield, over which Tidewater has no control, have played a most important role in the denial of Tidewater's application. The daytime propagation of standard broadcast signals is dependent upon the characteristics of the ground. A signal passing over ground with low conductivity, which is a factor of the composition of the soil and its dielectric constant, will be greatly attenuated and will provide service only a relatively short distance from the transmitter. A signal passing over ground with high conductivity will be attenuated much less and will provide service at a considerably greater distance from the transmitter. The best propagation--the least attenuation--occurs over salt water. Because the path

^{9/} A signal having a strength of at least 2 millivolts per meter is required to provide primary service to a community with a population of 2,500 or greater.

^{10/} The facts in this paragraph are from footnote 10 and paragraphs 12 and 21 of the findings of fact of the first Initial Decision. (A. 8, 11-12).

between Tidewater's proposed transmitter site near Smithfield and Norfolk falls almost entirely over salt water, the signal from the proposed station would be considerably greater over Norfolk than at the same distance on other bearings from the transmitter.

Although Tidewater's basic objective was, and is, to provide primarily an agricultural program service to rural areas and agriculturally-oriented towns generally west of Norfolk, the extremely low attenuation of the salt water path between Smithfield and Norfolk would produce a signal in excess of 5 millivolts per meter over most of Norfolk, and a primary service signal of 2 millivolts per meter over most of Norfolk's urbanized and metropolitan areas.^{11/} The fact

^{11/} The following findings of fact are contained in paragraph 16 of the Second Supplemental Initial Decision:

16. The proposed station would render a primary interference free service to 1,016,238 persons in an area of 6,584 square miles,^{5/} including all of the following counties in Virginia: Gloucester (11,919), Isle of Wight (17,164), James City (11,539), Mathews (7,121), Nansemond (31,366), Norfolk (51,612), Northampton (16,966), Princess Anne (76,124), Surry (6,220) and York (21,583); and Gates County (19,254), North Carolina. In addition to service to Smithfield Tidewater would place a 2 mv/m or better signal over all of the cities of Norfolk (305,872); Portsmouth (114,773); Newport News (113,662); Hampton (89,258); Suffolk (12,609); and Virginia Beach (8,091) all in Virginia.

^{5/} If the presently pending application of Catonsville Broadcasting Company (BP-16105) is granted, the interference free primary service area of Tidewater would be reduced to an area of 5,642 square miles, having a population of 970,682 persons. (A. 77-78).

that Norfolk and the other cities would lie within Tidewater's proposed service area gave the Commission no concern until early in 1966, almost seven years after Tidewater's application was filed and more than six years after the application had been designated for hearing.

Before the Commission had completed its study of Tidewater's application, Fischer, on May 15, 1959, filed his application for a third station at Newport News. His application also proposed non-directional daytime only operation on 940 kilohertz with a power of 10 kilowatts. Because the proposed transmitter site was only a mile or so from Tidewater's site, the technical coverage of the two proposals was essentially identical.

Faced with two mutually exclusive applications, the Commission had no alternative but to designate them for hearing to determine which, if either, should be granted. By an Order released October 28, 1959, the Commission designated the two applications for hearing in consolidation with a number of other applications for new or modified stations on the same or immediately adjacent channels. In the Order, the Commission found both Tidewater and Fischer fully qualified to construct and operate the station each proposed except for possible electrical interference with one or more existing or proposed

operations. In addition to appropriate interference and coverage issues, the Commission specified a Section 307(b) issue and a standard comparative issue.^{12/} Amendments and dismissals of other applications made possible the holding of a hearing upon only the Tidewater and Fischer applications.

12/ The issues of interest to this appeal were as follows:

(14) To determine, in light of Section 307(b) of the Communications Act of 1934, as amended, which of the instant proposals would best provide a fair, efficient and equitable distribution of radio service.

* * * * *

(20) To determine, in the event Newport News, Virginia, or Smithfield, Virginia, is preferred under Issue 14, whether Edwin R. Fischer or Tidewater Broadcasting Company will provide service to the community selected as having the greater need for a new facility.

(21) To determine, if Edwin R. Fischer and Tidewater Broadcasting Company would provide service to the community determined to have the greater need for a new facility, which of the proposals of these two applicants would better serve the public interest in the light of evidence adduced pursuant to the foregoing issues and the record made with respect to significant differences between the applicants as to:

- (a) The background and experience of each having a bearing on the applicant's ability to own and operate its proposed station.
- (b) The proposal of each of the applicants with respect to the management and operation of the proposed station.
- (c) The programming service proposed in each of said applications.

* * * * *

(23) To determine, in the light of the evidence adduced pursuant to the foregoing issues, which, if any, of the instant applications should be granted.
(A. 3-4).

Although not germane to Tidewater's appeal, the facts in the next three paragraphs are germane to Fischer's appeal in Case No. 21,942 and explain why a second hearing was held and a Supplemental Initial Decision was issued. They are offered only as background.

At the time Tidewater filed its application for Smithfield, three of its four stockholders, collectively owning 90 percent of its stock, were the sole stockholders of a corporation which was the licensee of Station WESR, Tasley, Virginia, on the eastern shore of Virginia north of Norfolk and across and up Chesapeake Bay from the Smithfield area. Even though there would be some overlap of the service areas of the proposed station at Smithfield and WESR, the overlap was of such small magnitude as not to require an issue of possible contravention of the Commission's multiple ownership rule and policy.

Following a hearing in 1960, the Examiner issued an Initial Decision on July 11, 1961, in which she concluded that Tidewater must be preferred over Fischer under both the Section 307(b) issue and the standard comparative issue. Fischer filed exceptions. For reasons never understood by Tidewater and not germane to this appeal, the Commission stayed further action in this proceeding for almost

three years. During that period, two events occurred. The first was the filing of an application to improve the service of Station WESR at Tasley by increasing the power. If granted, the overlap of the service areas of WESR and Smithfield would have increased somewhat, but not to the extent that the multiple ownership rule and policy then in effect would have been contravened. The second event, which came sometime after the WESR application was filed, was an amendment of the multiple ownership rule, then Section 3.35 (now Section 73.35, 47 C.F.R. §73.35). Because of the stay in effect in the Tidewater-Fischer proceeding and the amendment of the multiple ownership rule, the Commission did not act upon the WESR application until Tidewater petitioned for a further hearing upon a new issue to determine whether the operation at Smithfield would overlap the operation of WESR with higher power to the extent that a grant of the Smithfield application would be impossible. The Commission first granted the application to increase the power of WESR and then, by an Order released April 30, 1964, ordered a further hearing to determine if a grant of Tidewater's application was precluded by

the modified rule.^{13/} (R. 586-587).

After a further hearing late in 1964, the Examiner issued a Supplemental Initial Decision on April 19, 1965, in which she stated that there was "serious doubt as to whether the amendment to Section 73.35(a), adopted in late May, released early in June, and effective July 16, 1964, is applicable to Tidewater's proposal," and then concluded that, even if Section 73.35(a) was applicable, Tidewater had met its burden of justifying a waiver. The conclusions of the Initial Decision and the proposed grant of Tidewater's application were reaffirmed. (A. 49-66).

Oral argument on the exceptions to both the Initial Decision and the Supplemental Initial Decision were held by the Commission en banc on December 9, 1965. (Tr. 1140). Before a final decision was issued, the Commission, on December 27, 1965, issued its Policy Statement On Section 307(b) Considerations For Standard Broadcast Facilities Involving Suburban Communities (307(b) Suburban Policy),

13/ The added issue was as follows:

To determine whether a grant of the proposal of the Tidewater Broadcasting Company, Incorporated, would be in contravention of the provisions of Section 73.35(a) of the Commission's Rules with respect to multiple ownership of standard broadcast stations, and, if so, whether circumstances exist which would justify waiver of the rule. (A. 50).

supra. On January 20, 1966, the Commission issued a Memorandum Opinion and Order in which it first concluded that Tidewater had justified a waiver of the multiple ownership rule, Section 73.35(a), and then ordered a further hearing upon issues relating to the 307(b) Suburban Policy because the proposed 5 millivolt per meter contours of both Tidewater and Fischer would fall over or "penetrate" Norfolk, a city with a population of over 50,000 and twice as large as the specified communities, Smithfield and Newport News, respectively.^{14/} (A. 67-71).

14/ The added 307(b) Suburban Policy issues were as follows:

(a) To determine whether each of the proposals will realistically provide a local transmission facility for its specified station location or for another larger community, in light of all of the relevant evidence, including, but not necessarily limited to, the showing with respect to:

(1) The extent to which each specified station location has been ascertained by each applicant to have separate and distinct programming needs;

(2) The extent to which the needs of each specified station location are being met by existing standard broadcast stations;

(3) The extent to which each applicant's program proposal will meet the specific, unsatisfied programming needs of its specified station location; and

(4) The extent to which the projected sources of each applicant's advertising revenues within its specified station location are adequate to support its proposal, as compared with its projected sources from all other areas. (Footnote continued on next page.)

Tidewater and Fischer returned to the hearing room for the third time in the spring and summer of 1966. At that hearing, Tidewater presented extensive evidence to meet each of the new 307(b) Suburban Policy issues. Fischer, on the other hand, offered only engineering (technical) evidence, even though the new issues were equally applicable to both applicants. On January 17, 1967, the Examiner issued her Second Supplemental Initial Decision. With respect to Tidewater, the Examiner (1) made most extensive and comprehensive findings of fact on each of the new 307(b) Suburban Policy issues covering 17 single spaced pages^{15/} (A. 78-88) and supplemented by an eight page appendix (A. 97-105), (2) analyzed the 307(b) Suburban Policy (A. 90-92), (3) concluded that Tidewater had amply rebutted any presumption that its proposed station would "turn its back on Smithfield"

14/ (Cont'd.)

(b) To determine, in the event that it is concluded pursuant to the foregoing issue (a) that one or both of the proposals will not realistically provide a local transmission service for its specified station location, whether each such proposal meets all of the technical provisions of the Rules, including §§73.30, 73.31, and 73.188(b)(1) and (2), for standard broadcast stations assigned to the most populous community for which it is determined that the proposal will realistically provide a local transmission service. (A. 69-70).

15/ The 20 pages included seven single spaced pages of the first Initial Decision which were incorporated by reference. (A. 77, 85, 6, 8, 23-28).

and be a Norfolk rather than a Smithfield station (A. 93) and (4) proposed for the third time the grant of Tidewater's application. (A. 95-96). For the third time the Examiner proposed to deny Fischer's application.

Following the filing of exceptions by Fisher and the Commission's Broadcast Bureau and the presentation of oral argument, the Commission, on April 16, 1968, released its Decision denying both applications. With respect to Tidewater, the Commission did not delete a single word or modify a single sentence of the more than 15 single spaced pages of the Examiner's findings of fact. Instead, the Commission ignored most of those findings of fact and distorted others. In addition, the Commission faulted Tidewater for having failed to show the possibility of operation with other facilities such as reduced power and a directional antenna system, even though such evidence was not contemplated by either the 307(b) Suburban Policy or any issue and most certainly would have been rejected under a long established policy which prohibits the showing of an alternate proposal.

As noted earlier, Fischer filed a timely appeal with this Court, Case No. 21,942. Tidewater, however, petitioned for rehearing pursuant to Section 405 of the Communications Act, 47 U.S.C. §405. The petition for rehearing presented

each of the contentions present in this appeal, and also requested permission to amend the applications to submit revised proposals rather than having to either file entirely new applications, which most certainly will involve another lengthy hearing,^{16/} or abandon the effort to provide a much needed broadcast service.

Tidewater's petition for rehearing was denied by a Memorandum Opinion and Order released by the Commission on September 16, 1968. (A. 123). This appeal followed.

ARGUMENT

Although Tidewater is increasingly convinced that the 307(b) Suburban Policy, as applied by the Commission in this and other cases to deny applications rather than to assist in the choice under Section 307(b) of the Communications Act, 47 U.S.C. §307(b), between applicants for different communi-

^{16/} Shortly after the release of the Decision, the Commission received an application from an existing station in North Carolina seeking to increase power on the channel which is mutually exclusive with the use of the channel in the Smithfield area. Tidewater's fears of yet another long drawn out and expensive hearing have been substantiated.

ties actually is a substantive rule which is unlawful because it was adopted without following the rule making procedures required by Section 553 of the Administrative Procedure Act, 5 U.S.C. §553, it did not present that precise question to the Commission in its petition for rehearing. Therefore, it will not argue the question in this brief. However, the question is discussed at some length and in some detail in the briefs in Fischer's appeal, Case No. 21,942.

Tidewater did challenge the lawfulness of the 307(b) Suburban Policy on other grounds in its petition for rehearing. Each of the questions presented by this appeal were presented to the Commission by Tidewater's petition for rehearing and, therefore, are properly before the Court.

A brief discussion of the background of the 307(b) Suburban Policy seems desirable.

In the standard (AM) broadcast service, channel allocations and station assignments are made by the grant of applications which specify the channel and power desired and the community to which the station would be licensed. ^{17/} The

^{17/} Section 73.30(a)(1) of the Commission's Rules, 47 C.F.R. §73.30(a)(1), provides that "each standard broadcast station will be licensed to serve primarily a particular city, town, political subdivision, or community which will be specified in the station license and the station will be considered to be located in such place." The place named in the license is that selected by the applicant and specified in the application.

availability of a channel depends almost entirely upon engineering (technical) requirements.^{18/} In the frequency modulation (FM) and television (TV) broadcast services, channels are allocated to specific cities by rules adopted following rule making procedures, and all applications must adhere to the specific channel assignments.^{19/}

The growth of standard broadcasting over the last thirty years, and particularly since World War II, has more than matched the growth of the population and the economy. As metropolitan areas and more remote towns and cities grew, there developed an increasing demand for broadcast stations in communities other than the central cities to metropolitan areas, and an increasing number of applications for new standard broadcast stations to meet those demands. If the applications satisfied certain minimum requirements of the Commission's Rules, did not propose excessive interference to existing stations, and were not mutually exclusive with one or more other appli-

^{18/} The only exceptions are a handful of clear channels for high power use in or near specified cities made by treaties between the United States and other North American countries.

^{19/} FM and TV channels are allocated by Sections 73.202 and 73.606, respectively, of the Commission's Rules, 47 C.F.R. §§73.202, 73.606. Under special and limited circumstances a channel may be used by a station licensed to a community located close to the community to which the channel is allocated by rule.

cations, they were granted without hearing. The fact that a proposed operation, not mutually exclusive with another application, would provide primary service^{20/} to portions or even all of a central city of a metropolitan area gave the Commission no concern. Hundreds of such stations operating today throughout the United States present no problems to the Commission merely because parts or all of central cities lie within their primary service areas. A number of such stations are operating in the Washington area.

A mere handful of cases over the last twenty years, probably not more than a dozen, have involved two or more mutually exclusive standard broadcast applications, at least one for a community sufficiently close to the central city of a metropolitan area as to provide primary service to portions or all of the central city. In only three or four of those cases did the Commission encounter any significant difficulty in making the choice based upon the needs of the communities

^{20/} A groundwave signal having a strength of at least 2 millivolts per meter is required for primary service to a city or other community having a population of 2,500 or greater.

as required by Section 307(b).^{21/} One of the earliest cases was Times-Star Publishing Co., 4 Pike & Fischer RR 718, 725 (1949), which involved mutually exclusive applications for new standard broadcast stations at Alameda, adjacent to Oakland, and Palo Alto, some 30 miles south of Oakland and San Francisco and 20 miles north of San Jose, California. There, the Commission encountered absolutely no difficulty in preferring Palo Alto because it was more remote from any central city and from any existing broadcast station.

The 307(b) Suburban Policy is the direct descendant of the next case to arise, Huntington Broadcasting Co., 5 Pike & Fischer RR 721 (1950), rehearing denied, 6 Pike & Fischer 569 (1950). There, the Commission held that it was unable to make the Section 307(b) choice between mutually exclusive applications for new standard broadcast stations at Los Angeles and adjacent Huntington Park because of the close relationship of the two cities and because the proposed service areas were essentially identical. The ultimate choice

^{21/} When mutually exclusive applications involve separate communities, a determination must be made as to which community has the greater need for the proposed station. The qualifications and proposals of the applicants do not enter into that determination. Federal Communications Commission v. Allentown Broadcasting Corp., 349 U.S. 358 (1955).

was based upon a comparison of the applicants' qualifications and non-technical proposals. This Court approved the Commission's inability to make a Section 307(b) choice. Huntington Broadcasting Co. v. Federal Communications Commission, 89 U.S. App. D.C. 222, 192 F2d 33 (1951).

The next case to come before this Court was Monroeville Broadcasting Co., 35 FCC 657, 1 Pike & Fischer RR 2d 607 (1963), reconsideration denied, 36 FCC 296, 1 Pike & Fischer RR 2d 726 (1964),^{22/} which presented a somewhat unique problem involving two mutually exclusive applications for widely separated communities close to the same central city, Pittsburgh, Pennsylvania. One applicant (Miners) sought to improve the facilities of an existing station in a manner which would provide primary service (see footnote 9, above) to 98 percent of Pittsburgh and the other applicant (Monroeville) sought a new station which would provide primary service to about one-third of

^{22/} Speidel Broadcasting Corp. of Ohio v. Federal Communications Commission, 2 Pike & Fischer RR 2094 (1964), was a per curiam opinion affirming Speidel Broadcasting Corp. of Ohio, 35 FCC 74, 25 Pike & Fischer RR 533 (1963), reconsideration denied, 35 FCC 755, 1 Pike & Fischer RR 2d 726 (1963), in which the Commission had considered an application for a new standard broadcast station in a community contiguous to Dayton, Ohio, as an application for Dayton in making the Section 307(b) choice of a mutually exclusive application for the first station at Xenia, Ohio, some 15 miles from Dayton. The extension of the Huntington doctrine or rule was not raised in the appeal.

Pittsburgh. In making the Section 307(b) comparison, the Commission considered Miners' application as one for Pittsburgh and then concluded that the need of Monroeville for its first station was greater than the need of Pittsburgh for its ninth station. In support, the Commission relied upon the Huntington doctrine and two subsequent Commission decisions in cases involving a mutually exclusive application which would provide primary service to all or substantial portions of a nearby central city.^{23/} This Court remanded but did not set aside the grant of the Monroeville application. Miners Broadcasting Service, Inc. v. Federal Communications Commission, 121 U.S. App. D.C. 222, 349 F.2d 199 (1965).

An extended discussion of Miners is unnecessary at this point. The Court had before it and considered only the question of when and how Section 307(b) should be applied in choosing between mutually exclusive standard broadcast applications which specified different communities as the station location when the proposal of at least one would provide some primary service to a nearby central city. The Court said:

^{23/} The cases were Radio Crawfordsville, Inc., 34 FCC 996, 25 Pike & Fischer RR 533 (1963), reconsideration denied, 35 FCC 438, 25 Pike & Fischer RR 1001 (1963), and Speidel Broadcasting Corp. of Ohio, supra.

The Commission's use of the Huntington doctrine in this case had far different results. Rather than allowing the Section 307(b) issue to be avoided, it predetermined that issue in Monroeville's favor by designating the Miners application as an application for an urban area served by eight outlets while designating Monroeville's as one for a suburb served by none. Because of the preference accorded first local transmission services, analysis of any factor other than number of broadcast outlets was precluded. This is obviously a much more drastic application of Huntington than to deprive one party of what is deemed to be, under the facts of this case, an unfair preference over the other. It creates, rather than destroys, inequities. That Huntington was an approach furthering the public interest when used to widen inquiry does not necessarily mean that it is such when used to narrow inquiry. The use of the "exceptional" rule of Huntington in this case is permissible only if the Commission recognizes it as an extension of the rule and gives adequate reasons for it. The Commission has failed to do so.^{6/}

^{6/} The Commission has decided two similar cases on the ground given in this case. Speidel Broadcasting Corp. of Ohio, 25 Pike & Fischer RR 723 (1963); Radio Crawfordsville, Inc., 25 Pike & Fischer RR 533 (1963). Neither of these cases contains an adequate explanation of the extension of the rules. As we said in Pinellas Broadcasting Co. v. Federal Communications Commission, 97 US App DC 236, 238, 230 F2d 204, 206 [13 RR 2058] (dictum), cert. denied, 350 US 1007 (1956), "The rationality of some basic theses as to the public good is self-evident, and of some others is so well known as to require judicial notice. But it may sometimes be that the supporting philosophy of a general policy on such matters is so obscure as to require explanation. In such a case, if the conclusion is challenged as arbitrary, it would

seem that the court, in the process of adjudicating that issue, can require a statement of the premises for and the reasoning toward the general policy.

Standards determining the scope of the Huntington doctrine in comparative hearings must be established. Its scope is now somewhat obscure.

(Emphasis supplied)

Most significantly, the question of how a single application which would provide some primary service to a central city should be considered was not before the Court.

Immediately following the remand in Miners, the Commission issued a Memorandum Opinion and Order inviting the parties to submit briefs and oral argument on the "basic 307(b) policy questions." Monroeville Broadcasting Company, 1 FCC 2d 319, 5 Pike & Fischer RR 2d 547 (1965). By separate orders, parties in two other proceedings involving mutually exclusive applications were invited to participate. Tidewater and Fischer were not invited to participate. A copy of the Memorandum Opinion and Order is submitted as Appendix A to this brief.

Following the submission of briefs and oral argument, the Commission, on December 27, 1965, issued its 307(b) Suburban Policy. Without prior notice, the Commission adopted a policy which has since been applicable to single, unopposed

applications as well as to mutually exclusive applications. A copy of the 307(b) Suburban Policy statement is attached as Appendix B.

Petitions for reconsideration of the policy statement were denied by a Memorandum Opinion and Order, 2 FCC 2d 866, 6 Pike & Fischer RR 2d 1908 (1966), released March 10, 1966, a copy of which is attached as Appendix C. More than two years later, and after the Decision denying Tidewater's and Fischer' applications had been issued, the Commission issued a Public Notice which it headed Clarification of Policy Statement on Section 307(b) Considerations for Standard Broadcast Facilities Involving Suburban Communities, 13 FCC 2d 391, 13 Pike & Fischer RR 2d 1901. A copy is attached as Appendix D.

I

THE COMMISSION FAILED TO GIVE ANY REASONABLE AND ADEQUATE EXPLANATION FOR A POLICY UNDER WHICH AN UNOPPOSED APPLICATION FULLY SATISFYING EVERY APPLICABLE RULE MAY BE DENIED.

Tidewater was found by the Commission to be fully qualified to own and operate the proposed Smithfield station. ^{24/}

^{24/} In its Order designating the application for hearing, the Commission found Tidewater legally, financially, technically and otherwise qualified to own and operate the proposed station except for possible interference to and from existing stations and pending applications (R. 158-168). All interference issues later were resolved in Tidewater's favor.

Its application satisfied every applicable rule of the Commission except the multiple ownership rule, §73.35, which the Commission waived.^{25/} Its application was unopposed following the independent denial of Fischer's application. Nevertheless, Tidewater's application was denied! Never before has a fully qualified and unopposed application which fully satisfied every applicable rule of the Commission been denied.

- A. The Commission Failed To Give Any Reasonable And Adequate Explanation For A Policy Under Which An Unopposed Application Fully Satisfying Every Applicable Rule May Be Denied.

The basic premise upon which the 307(b) Suburban Policy is based is stated, in paragraph 8 of the policy statement, as follows:

Our experience compels us to conclude that as their power and coverage are increased to serve larger numbers of persons, stations in metropolitan areas often tend to seek out national and regional advertisers and to identify themselves with the entire metropolitan area rather than with the particular needs of their specified communities.

(Emphasis supplied)

The record of the proceeding which led to the adoption of the 307(b) Suburban Policy is devoid of any facts or citations to

^{25/} Memorandum Opinion and Order released January 20, 1966 (A. 67-71).

support that statement which is the very heart of the policy.^{26/}

The Commission's answer to that contention, which Tidewater advanced in its petition for rehearing (R.1454-1455), was given as follows in its Memorandum Opinion and Order by which the petition was denied:

15. In considering Tidewater's remaining arguments that the 307(b) Policy Statement is improper and invalid, it is necessary to examine the background that led to the formulation of the Policy Statement. While Tidewater is correct that the matter was originally considered as the result of the remand of the Monroeville proceeding, 349 F2d 199, 5 RR 2d 2086 (1965), we clearly indicated in our Memorandum Opinion and Order, 1 FCC 2d 319, 5 RR 2d 547 (1965), scheduling oral arguments, that broad aspects of the suburban community applicant question would be examined. (A. 128).

Examination of that Memorandum Opinion and Order (Appendix A to this brief) does not provide support for the Commission's answer. Every single one of the cases referred to in that document involved at least two mutually exclusive applications and a Section 307(b) choice of communities. In fact, the Commission specifically requested the parties "to limit their briefs and arguments to the basic 307(b) policy

^{26/} Even if there was support for the statement, it would not be applicable to Tidewater, because its specified community, Smithfield, lies outside a metropolitan area.

questions."^{27/}

In footnote 6 of the Miners opinion, this Court stated as follows:

The Commission has decided two similar cases on the ground given in this case. Speidel Broadcasting Corp. of Ohio, 25 Pike & Fischer RR 723 (1963); Radio Crawfordsville, Inc., 25 Pike & Fischer RR 533 (1963). Neither of these cases contains an adequate explanation of the extension of the rules. As we said in Pinellas Broadcasting Co. v. Federal Communications Commission, 97 US App DC 236, 238, 230 F 2d 204, 206 /13 RR 2058/ (dictum), cert. denied, 350 US 1007 (1956), "The rationality of some basic theses as to the public good is self-evident, and of some others is so well known as to require judicial notice. But it may sometimes be that the supporting philosophy of a general policy on such matters is so obscure as to require explanation. In such a case, if the conclusion is challenged as arbitrary, it would seem that the court, in the process of adjudicating that issue, can require a statement of the premises for and the reasoning toward the general policy."

If the Commission can adopt and apply a policy under which an application fully satisfying every applicable rule

^{27/} The answer of the Commission's Broadcast Bureau to this argument, in paragraph 8 of its opposition to Tidewater's petition for rehearing, was no more persuasive. The Bureau merely referred to some of the Section 307(b) cases listed in that Memorandum Opinion and Order, to its "expertise" in other unidentified cases, and "sound reasoning and well-established facts established on many years of litigation." Not a single case or fact was cited by the Bureau. Nor does the Commission's experience and expertise lend support to the statement in the 307(b) Suburban Policy statement. The hundreds of stations in suburbs of central cities throughout the nation are operating in violation of their licenses if the Commission's statement is correct.

may be denied, there must be some reasonable basis and foundation for that policy.^{28/} Otherwise, the policy must fail because it is arbitrary and capricious.

Perhaps the Commission can come forward with some adequate explanation other than the unsupported and conclusionary statements contained in the 307(b) Suburban Policy statement. If a far more adequate answer is not forthcoming, the 307(b) Suburban Policy must be held to be arbitrary and unlawful.

^{28/} The fact that stations may "tend to seek out national and regional advertisers" is of no importance. Such advertising is just as much of benefit to the merchant and the resident of the suburb as to the merchant and the resident of the central city. In fact, merchants in the suburbs often help pay, directly or indirectly, for such national and regional advertising. Nor is the fact that stations may tend to "identify themselves with the entire metropolitan area" malum per se. A broadcast station is licensed to serve its entire service area. Petersburg Television Corp., 10 Pike & Fischer RR 567, 584K (1954). The conflict between the 307(b) Suburban Policy and Petersburg places an applicant in a trap from which there is no escape. As the Examiner stated in paragraph 4 of the conclusions of the Second Supplemental Initial Decision in this proceeding, the Commission's concern need only be that a "station in a suburban community may subordinate its service to that community in order to serve the nearby larger city, thus failing to satisfy the needs of its designated community for service which has been shown or presumed to exist." (A: 92).

B. The 307(b) Suburban Policy Is
Unnecessary For Non-Mutually
Exclusive Applications

A policy should not be adopted and then applied to deny applications which fully satisfy every applicable rule and qualification^{29/} unless there is some reasonable need for it. No such need exists for applications which are not mutually exclusive with another application specifying a different community as the station location. The Commission need only apply the already existing rules and authority.

One of the controls already available to the Commission is its authority to regulate the location of the main studio. Section 73.30(a)(1) of the Rules requires the main studio of a broadcast station to be located either within the community to which the station is licensed or at the transmitter. A suburban station simply cannot move its main studio into the control city without first obtaining a waiver of Section 73.30(a)(1).

Another control already available is the station identification rule, Section 73.117, 47 C.F.R. §73.117, which requires the station identification to clearly state the

^{29/} By "qualification," Tidewater is referring to legal, financial, technical and other qualifications which every applicant must meet before its application can be granted.

community to which the station is licensed in a manner which will not create an impression that the station is licensed to or located within another community.

A third control is built into the program portions of the application forms used for new stations and for renewal of the licenses of existing stations. Paragraph I of Section IV-A requires as follows:

1. A. State in Exhibit No. ____ the methods used by the applicant to ascertain the needs and interests of the public served by the station. Such information shall include (1) identification of representative groups, interests and organizations which were consulted and (2) the major communities or areas which applicant principally undertakes to serve.
- B. Describe in Exhibit No. ____ the significant needs and interests of the public which the applicant believes his station will serve during the coming license period, including those with respect to national and international matters.
- C. List in Exhibit No. ____ typical and illustrative programs or program series (excluding Entertainment and News) that applicant plans to broadcast during the coming license period to meet those needs and interests.

If information comes to the Commission's attention indicating that the promises and representations made in support of the grant of the original application for the station may not have been fulfilled, the Commission has ample authority to designate the renewal application for hearing to determine if the

station has fulfilled its original promises and
representations. ^{30/} No station owner in his right
mind would run the risk of losing his license if he
knew the Commission would order a hearing should the
"station in a suburban community ... subordinate its
service for that community in order to serve the near-
by larger city, thus failing to satisfy the needs of
its designated community for service which has been
shown or presumed to exist."

The simple inescapable fact is that the Com-
mission has far more effective means available than the
307(b) Suburban Policy to assure continuing service by
a suburban station for its suburban community. There is
no sound and valid reason for applying the 307(b) Suburban
Policy to an application which is not mutually exclusive
with another application for another community.

^{30/} A station license has a maximum term of three years.
Any other party believing the station has not ful-
filled its obligations to its community may apply for
the facilities of the station at the time the appli-
cation for renewal of the license is pending before
the Commission. This is the self-regulatory feature
built into the Communications Act which has seldom
been recognized.

C. The 307(b) Suburban Policy Is So Vague
And Indefinite That It Invites Arbitrary
And Capricious Denials of Non-Mutually
Exclusive Applications.

The very heart of the Court's remand in Miners which led to the 307(b) Suburban Policy was the lack of standards. As noted above, the Court stated, in footnote 6: "Standards determining the scope of the Huntington doctrine in comparative hearings must be established."

The comparative hearings considered by the Court involve only a Section 307(b) choice between applications for different communities, at least one a suburb of a central city. If the choice cannot be made under Section 307(b), the choice of one application over the other mutually exclusive applications must be made by comparing the applicant's qualifications and proposals. That is exactly what happened in Huntington. There always will be a grant of at least one application.

If standards are required for hearings where at least one application will always be granted, thereby providing service to the public, should not standards also be required for hearings where all applications may be denied, thereby failing to provide service to the public? The answer logically is "Yes."

The 307(b) Suburban Policy statement does not clearly, or even generally, set forth just what standards an applicant must meet and what quantum of evidence an applicant must present

to successfully rebut the presumption that its application must (or should) be considered as one for the central city rather than for the specified community.

That the Commission itself does not know what is expected of an applicant is clear from the Memorandum Opinion and Order, released March 10, 1966, which denied petitions for reconsideration of the 307(b) Suburban Policy statement.

(Appendix C of this brief). In paragraph 5, the Commission stated that "... the Policy Statement simply announced new guidelines to govern future hearings involving suburban applications without establishing any substantive provisions for the grant or denial of any of the applications." In paragraph 7, the Commission stated:

Since the purpose of our new approach is to determine whether an applicant will realistically serve his specified community or another larger community, we are persuaded that the type of evidence required to rebut such a presumption will necessarily differ, depending upon, among other variable factors, the applicant's proposed power, antenna directionalization and coverage.

The lack of definite standards was recognized by the Commission in its Decision in this proceeding.

14. The further hearing pursuant to the 307(b) Policy Statement was held to permit Tidewater to present evidence demonstrating that it will provide a realistic local transmission service for Smithfield. It is clear,

however, that the amount of evidence required to establish than /sic/ an applicant will provide a realistic local transmission service depends in large measure upon the objective facts concerning that proposal. (A. 115).

But nowhere in the policy statement or elsewhere has the Commission enunciated or defined "a realistic local transmission service" or "objective facts." The Commission's own admission that the "amount of evidence required ... depends in large measure upon the objective facts" conclusively proves that no definitive standards have been adopted.

Similar vague terms appear throughout the remainder of the Decision. In paragraph 16, the Commission stated:

In spite of the broad invitation to Tidewater in our remand Order to show that it will provide a realistic local transmission service for Smithfield, we are not persuaded that the record in this proceeding is sufficient to establish that Tidewater's proposal would not become merely another Norfolk station in view of its 10,000 watts of power and its substantial coverage of the entire metropolitan area. (A. 117).

But nowhere in its policy statement or elsewhere has the Commission ever stated, or even indicated with reasonable clarity, just what showing must be made to "persuade it."

In paragraph 11 of its Decision, the Commission stated:

Tidewater's estimate concerning potential revenues was based primarily upon the knowledge and experience of its president, Vernon H. Baker. No attempt was made to contact advertisers in Smithfield or the surrounding rural areas to determine whether they presently advertise or whether they would be interested in purchasing advertising over a local radio station. ^{31/} (A. 113).

Nowhere in the policy statement or elsewhere has the Commission stated, or even indicated, how estimates of revenue are to be obtained. ^{32/} Nowhere has it ever referred to contacts with advertisers. Nowhere has it said before this Decision that an applicant cannot rely upon the experience of one or more of its principals in the operation of a station in another nearby community of almost equal size. When the guidelines, standards and rules are not spelled out, it

^{31/} It will be shown subsequently that this statement is factually inaccurate. Tidewater relied upon the experience of its stockholders in the operation of Station WESR in Tasley, Virginia, a community even smaller in size than Smithfield.

^{32/} The following statement later in paragraph 17 further demonstrates the total lack of standards and guidelines:

This fact must also be considered in light of the meager showing which Tidewater has made with respect to potential revenues for its proposed station. (A. 117).
(Emphasis supplied).

Tidewater's showing was far greater than the Commission has required in hearings in which an applicant's financial qualifications were an issue and estimated revenues were of paramount importance in meeting the issue.

always is possible to say, "Sorry, not enough." Why bother to hold a hearing?

In paragraph 17 of its Decision, the Commission stated:

This is not meant to suggest that Tidewater's proposal will inevitably become merely another Norfolk station, but simply to indicate that Tidewater has failed to make a sufficient showing to establish that it will not eventually become such a station in view of its high power, its broad coverage of the metropolitan area, and its failure to demonstrate that revenues adequate to support the station are available in Smithfield and Isle of Wight County. (A. 117-118).

What is a "sufficient showing?" What is necessary to "demonstrate that revenues adequate to support the station are available in Smithfield and Isle of Wight County?" No one knows! All that is known is that the Commission said, "Not enough."

It is crystal clear that the Commission has failed to adopt any definitive standards to guide it and applicants in meeting and resolving issues arising from the 307(b) Suburban Policy statement, particularly when only non-mutually exclusive applications are under consideration.

In the absence of any definitive standards, how can this Court, upon review, ascertain if a complaint of an arbitrary denial of an application is well founded?

Tidewater presented the foregoing argument in its petition for rehearing. (R.1455-1458). The Commission's

answer, in paragraph 17 of the Memorandum Opinion and Order denying the petition for rehearing, was as follows:

17. Tidewater also contends that the Policy Statement is fatally vague and indefinite because an applicant can never know what is expected of him. However, there have been a substantial number of proceedings involving the Policy Statement which have resulted in grants of suburban applications. In addition to the cases to which we referred in our Decision in this proceeding, the necessary showing has been made in Naugatuck Valley Service, Inc. (WOWW), 8 FCC 2d 755, 10 RR 2d 737 (1967), aff'd sub nom. Northeast Broadcasting, Inc. v. Federal Communications Commission, _____ F 2d _____, 13 RR 2d 2102 (1968); and in Monroeville, supra. Thus, it is clear that not all applicants share Tidewater's alleged difficulty in understanding the intent and purpose of the Policy Statement. (A. 129).

The answer is simple. First, Tidewater was not discussing an "understanding of the intent and purpose of the Policy Statement," but the lack of guidelines and standards. Second, each of the cases referred to in the Decision ^{33/} involved non-hearing grants. That a double standard has been followed by the Commission, one for non-hearing grants and the other in hearings, is clear from a mere glance at those three applications. Third, two of those applications, as well as the application in Naugatuck-Northeastern, sought to increase the coverage of

33/ The cases referred to in the Decision are KEZY Radio, Inc., 3 FCC 2d 407, 7 Pike & Fischer RR 2d 294 (1966); WTOW, Inc., FCC 68-9, released January 10, 1968, an unpublished order; and Clay Broadcasters, Inc. 4 FCC 2d 932, 8 Peter & Fischer RR 687 (1966).

existing stations which already provided some primary service to the central city. It was easy for them to show, by reference to their records, that they had not attempted to become just another station for the central city at the expense of the suburban community to which they were licensed. All an applicant for a new station can offer are well prepared plans and promises. But here, in Monroeville, and in other cases the Commission has said, in effect, "we simply do not believe your plans will be fulfilled and your promises kept." The cases involving existing stations clearly establish that only an existing station has any significant chance to successfully rebut the presumption of the 307(b) Suburban Policy. Fourth, Tidewater did not have the benefit or guidance of those cases because the hearing at which it presented its evidence was held before the cases were decided. If those cases do provide some guidelines and standards, this case should be remanded to the Commission with instructions to afford Tidewater an opportunity to present additional evidence.

Once again the question is presented: "In the absence of some definitive standards, how may the Court, upon review, ascertain if a complaint of arbitrary denial of an application is well founded?"

II

THE MANNER IN WHICH THE 307(B) SUBURBAN POLICY
WAS APPLIED TO DENY TIDEWATER'S APPLICATION VIOLATED
THE BASIC OBJECTIVES AND REQUIREMENTS OF THE
COMMUNICATIONS ACT, INCLUDING SECTION 307(B)

The Commission was established and exists for the purpose of providing, "... so far as possible, to all the people of the United States, a rapid, efficient, nationwide and world-wide wire and communications service ...". Section 1, Communications Act of 1934, as amended, 47 U.S.C. §151. (Emphasis supplied). Radio broadcasting is an integral part of the nationwide service.

Section 307(b) of the Act, upon which all broadcast assignments must be based, is as follows:

In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is a demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several states and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

In denying Tidewater's application, the Commission referred, in paragraph 16 of its Decision, to "a realistic local transmission service for Smithfield" and then concluded in paragraph 18, that "... Tidewater has failed to establish that its proposal would not become a Norfolk station." (R.1434K-1434L). The statement and conclusion ignores certain basic provisions of Section 307(b), particularly the term "radio service" and the word "communities."

It is well settled that the term "radio service" comprehends both transmission service and reception service. The following clear cut and often quoted definition of the term appears in a 1950 report of the Commission concerning the Origination Point of Programs of Broadcast Stations, Docket No. 8747, 1 Pike & Fischer RR 91: 465, 91:466:

We have consistently held that the term "radio service" as used in Section 307(b) comprehends both transmission and reception service. Transmission service is the opportunity which a radio station provides for the development and expression of local interest, ideas and talents and for the production of radio programs of special interest to a particular community. Reception service on the other hand is merely the presence in any area of a listenable signal. It is the location of the studio rather than the transmitter which is of particular significance in connection with transmission service. A station often provides service to areas at a considerable distance from its transmitter but a station cannot serve as a medium of local self expression unless it provides a reasonably accessible studio for the origination of local programs.

(Emphasis supplied)

This quotation appears in WSIX Broadcasting Station, 8 Pike & Fischer RR 216 (1952), which the Commission has cited in a recent brief in another case, and in numerous decisions and orders over the period of the last eighteen years. Earlier statements of the same definition appear in Utica Observer-Dispatch, Inc. 11 FCC 383, 3 Pike & Fischer RR 265 (1964), and in Newark Broadcasting Corporation, 11 FCC 956, 3 Pike & Fischer RR 839, 853 (1947).

Definitions of "communities," as used in Section 307(b), are somewhat less precise. In Mercer Broadcasting Company, 13 Pike & Fischer RR 891, 909 (1957), the Commission said:

10. There is no hard-and-fast rule by which it can be judged whether a particular population grouping is to be classified as a community for making the choice required by Section 307(b); ... Examination of these and other cases in which the "community" question has arisen shows that all relevant facts in each case must be weighed before a valid answer can be forthcoming.

11. At the outset we may dispose of the suggestion that the fact of incorporation or non-incorporation of the group /of communities/ in question is of decisive import. In numerous cases the Commission has ruled that the fact that an area is incorporated is not enough in itself to justify its treatment as a separate "community" for 307(b) purposes; conversely, the absence of incorporation does not compel the conclusion a group is not a "community." The corporate status of a community is but one factor to be weighed in any 307(b) decision...".

Although a community, for Section 307(b) purposes, need not necessarily be a single incorporated city or town, it is clear that it cannot be of sufficient size that the studios of the station are not readily accessible to residents of the area. In Five Cities Broadcasting Co., Inc. 35 FCC 501, 1 Pike & Fischer RR 2d 279 (1963), a case involving a Section 307(b) choice between mutually exclusive applications for different communities, the Commission rejected the contention that one applicant's community was half of a county except for one named city. There, the Commission said:

Moreover, the Commission made it clear in Seven Locks Broadcasting Co., 22 RR 967 (1962), that to qualify as a "city, town, political subdivision, or community" a place of station location must be an identifiable population grouping separate and apart from all others and that it must not enclose within its geographic boundaries areas or populations more logically identified as or associated with some other location.

A. In Concluding That Tidewater Had Failed To Establish That Its Station Would Not Become A Norfolk Station, the Commission Failed To Consider The Interdependence of Community, Main Studio Location, and Transmission Service

It is clear from the basic definitions of "radio service" and "communities" that every broadcast station provides two types of service, one transmission service and the other reception service, and that, of the two, transmission service is far more important because it provides an outlet for local self-expression.^{34/}

Although the Commission did not note in its Decision that Smithfield is 23 miles by highway via a toll bridge-tunnel from Norfolk, it did note, in paragraph 16, that "the community

^{34/} The term "local self-expression" means and includes the broadcast of local news; local weather reports, forecasts, and warnings; local emergency bulletins of police, fire, Civil Defense, and other agencies; local highway and traffic conditions; local school and business closings; local discussion of public and controversial issues; local governmental programs; local election campaigns and returns; local educational programs; local charitable and religious programs; and dozens of other local services and programs. However, "local" is not limited to the boundaries of the community which would be shown in the license as the station's location, but includes the areas from which the station's studios are the most accessible of all stations heard in the area.

of Smithfield and Isle of Wight County are clearly independent of the overall metropolitan area because of the geographic characteristics of the area." (R.1434J). But nowhere did the Commission give any indication that it recognized the studios of Tidewater's proposed station would be so far from Norfolk that, by no stretch of the imagination, could they be considered as readily accessible to residents of Norfolk. Nowhere in the Decision did the Commission give any consideration to its rule, Section 73.30(a)(1), which requires the main studios of a station to be located within the community to which it is licensed or at its transmitter, which in this case would be only two or three miles from Smithfield and readily accessible from Smithfield. And nowhere did the Commission recognize that, under its own rules, it would be absolutely impossible for Tidewater to locate its studios so as to be readily accessible to the residents of Norfolk, which is necessary to provide transmission service, without first obtaining approval from the Commission.

When the Commission's own rules would prevent Tidewater's station from becoming a Norfolk station without first having obtained the Commission's permission, what more persuasive showing can possibly be required?

When consideration is given to all of the relevant

factors, it is readily apparent that the Commission's conclusion that Tidewater had failed to establish that its station would not become a Norfolk station was arbitrary and capricious.

B. In Basing The Denial Of Tidewater's Application Primarily Upon The Power Proposed, The Commission Failed To Consider That High Power Is Necessary To Provide Service To Widespread Rural Area.

Always before its Decision in this case, the Commission has recognized the needs and rights of persons living in rural areas to have radio program service responsive to their needs and interests. The treaties with other North American nations and the Commission's Rules recognize that wide rural area service can only be provided by stations operating with high power. The lowest power stations, designated as Class IV stations, operate with a power not exceeding one kilowatt during the day and 250 watts at night. Section 73.22(c)(1) of the Rules, 47 C.F.R. § 73.22(c)(1), states:

A Class IV station is a station operating on a local channel and designed to render service primarily to a city or town and the suburban and rural areas contiguous thereto.

The next class of station, designated Class III, operates on a regional channel with a power not exceeding 5 kilowatts.

Section 73.22(b)(1) provides:

A Class III station is a station which operates on a regional channel

and is designed to render service primarily to a principal center of population and the rural area contiguous thereto.

The next class, designated Class II, operates on a clear channel with a power not exceeding 50 kilowatts. Obviously, a station with a power of 10 kilowatts, as proposed by Tidewater, would have a larger service area than would a station with lower power, such as a Class III 5 kilowatt station, assuming propagation factors such as soil conductivity and frequency are essentially the same.

Instead of praising Tidewater for proposing an expensive, high power, 10 kilowatt installation which would provide service to wide rural areas and for promising to concentrate upon service to the rural areas, which few stations located in major population centers do today, the Commission condemned Tidewater and denied its application for proposing such high power. In so doing, the Commission completely ignored the statement in paragraph 9 of its policy statement that "we wish to encourage each applicant to propose as much power as he will need to comply with our allocation rules." Further, the Commission completely ignored the fact that Section 307(b) requires an efficient allocation of facilities, and that operation with a power of

10 kilowatts is a more efficient use of the channel than operation with lower power.

If an applicant cannot propose sufficient power to serve a rural area when its purposes and objectives are to provide a much needed agricultural service, how can the residents of the farms and rural communities receive radio service? It is clear that the Commission was so preoccupied with its 307(b) Suburban Policy that it lost sight of its duty and obligation to provide service to the rural areas as well as to the major cities and population centers. Such a policy, as applied here, clearly ignores or defeats the very purpose for which the Commission was created, which is to provide service, not withhold service.

C. In Basing Its Denial Of Tidewater's Application Partly Upon A Comparison Of The Urban And Rural Populations Which Would Receive Reception Service, The Commission Ignored The Mandate of Section 307(b).

In paragraph 9 of its Decision, the Commission noted that Tidewater's proposal would provide primary service "to an urban population in excess of 736,000 persons including all of the Newport News-Hampton and the Norfolk-Portsmouth Urbanized Areas and the cities of Suffolk and Virginia Beach" and, "At the same time, would provide /primary/ service to an additional /rural/ population of at least 234,682 persons

residing in other areas of Virginia and North Carolina."

(A. 112). In footnote 22, the Commission stated that "even assuming that its proposal would cover all of that five county area, the potential audience in that area would be less than 95,000 persons and less than ten percent of its total potential audience as an area wide station." (A. 116).

As long ago as 1948, the Commission unequivocally stated that Section 307(b) does not contemplate a "numbers game." Although the case involved mutually exclusive applications for separate cities, the following statement in Northwestern Ohio Broadcasting Corp., 3 Pike & Fischer RR 1945 (1948), is equally applicable here:

5. In making this determination to prefer Lima, we are aware that the Sky Way Broadcasting Corporation would serve a larger population both day and night, and particularly during the day when it proposes to use 5 kw power and would serve a population approximately three times greater in an area more than two and one-half times larger than would the Lima applicant. We have further considered the fact that regional channels, such as is requested here, are normally allocated to render primary service to metropolitan areas and rural areas contiguous to those districts. However, we believe that the foregoing factors are outweighed by the greater need in respect to radio broadcast service to the substantial population of the city of Lima and of its rural area which presently does not receive a choice of locally originated programs. For unless due recognition is given to the claims of smaller communities

embracing a population of some substantial size, an undue concentration of facilities in the larger communities will inevitably result. It is evident from our discussion herein that we have considered each of the criteria of Section 307(b); however, there is nothing in the Communications Act, our Rules or Regulations, or our policy which requires the Commission, in a comparative proceeding such as this, to give equal weight to each criterion without regard to the facts of each particular case and the substantial compliance of such facts with the criteria of this Section when viewed in the light of the mandate of the Communications Act, requiring the Commission to provide the most widespread and effective broadcast service possible to this country.

(Emphasis supplied)

As stated in footnote 22 of the Decision (A. 116), even with 10 kilowatts of power Tidewater's proposed station would be unable to provide primary service (a signal of at least 0.5 millivolts per meter) to the entire five county rural area Tidewater desires primarily to serve. Obviously, any reduction in power to satisfy the Commission under its 307(b) Suburban Policy would reduce coverage of the rural areas, thereby further defeating one of the basic objectives of Sections 1 and 307(b) of the Communications Act.

Every person in the five-county area is just as much entitled to the proposed service as every person in Norfolk and the metropolitan areas. In enacting Section 307(b), Congress intended that the individual needs and rights be recognized and satisfied. This the Commission has failed to do by the denial of Tidewater's application.

III

THE COMMISSION ERRED IN REFUSING TIDEWATER'S REQUEST TO SUBMIT A NEW TECHNICAL PROPOSAL.

It is obvious from even a casual reading of the Decision that Tidewater's application was denied because it proposed operation with a power of 10 kilowatts and a non-directional antenna.

In paragraph 9 of the 307(b) Suburban Policy statement, the Commission said as follows:

9. This new policy is intended to provide an accommodation of heretofore apparently conflicting allocation considerations. While we still wish to discourage any proposal that will be merely a sub-standard central city station, we are persuaded that many developing and deserving suburban communities should be afforded an opportunity to obtain a first local transmission service. Moreover, while we wish to encourage each applicant to propose as much power as he will need to comply with our allocation rules, every applicant who falls within our test will be required to demonstrate that his proposal is designed to provide a realistic local transmission service for his specified community.

As stated on page 4 of this brief, Tidewater proposed a power of 10 kilowatts so as to provide the best possible service primarily to the five county area generally west of Norfolk and south of the James River. That the proposal fully satisfied the Commission's "allocation rules" is conclusively proven by the fact that the Commission, when it designated the application for hearing, did not specify

an issue concerning compliance with allocation rules and policies, but only specified the appropriate interference and coverage issues always specified in such cases, a Section 307(b) issue, and a standard comparative issue. (See page 9, above). Even when the Commission ordered a further hearing on 307(b) Suburban Policy issues, it did not include an issue as to whether Tidewater's proposal complied with the "allocation rules."

It was not until the issuance of the Decision that Tidewater was placed on notice that it would be penalized for failure to amend its proposal or to submit an alternate proposal. At the hearing, counsel for the Broadcast Bureau, who participates in hearings for the purpose of assisting in compiling a full and complete record so that all public interest considerations will be presented, did not request or even suggest any engineering (technical) evidence. In paragraph 13 of the Decision, the Commission said:

Thus, we also stated in the 307(b) Policy Statement that substandard central city stations should be discouraged and that such applications should only propose as much power as they need to comply with our allocation rules. /Note that the word "only" has been added for the first time./ In this respect, Tidewater has not shown what effect use of lower power, directionalized operation, or a different transmitter site would have upon its proposal.

(A. 114) (Emphasis supplied)

As soon as Tidewater read that statement, it ordered its consulting engineer to prepare a study of "what effect use of lower power, directionalized operation, ... and a different transmitter site would have upon its proposal." The study showed that operation with a power of 5 kilowatts using a directional antenna and another transmitter site is feasible to retain the coverage to the five county area proposed in the application. In its petition for rehearing, Tidewater requested permission to either submit the study as an alternate proposal or to amend its application. (R.1439-1440). The request was rejected as untimely.^{35/} (A. 124-125).

It is respectfully submitted that Tidewater has been deprived of the full and fair hearing to which it is entitled by law by the changing of criteria and standards without notice. This Court's opinion of October 18, 1968, in Case No. 21,259, Rodale Press, Inc. v. Federal Trade Commission, is most pertinent. The following appears on page 8 of the slip opinion:

^{35/} In its opposition to the petition for rehearing, the Commission's Broadcast Bureau noted some errors in the hastily prepared (because of lack of time) engineering. (R. 1513-13). Even though the errors were corrected long before the Commission acted upon the petition, the Memorandum Opinion and Order denying the petition refers to the errors without noting that they had been corrected. (R. 1513-33).

The Administrative Procedure Act, in 5 U.S.C. §554(b) (1964) provides in pertinent part: "Persons entitled to notice of an agency hearing shall be timely informed of ... (3) the matters of fact and law asserted." (Emphasis supplied). Hence it is well settled that an agency may not change theories in mid-stream without giving the respondents reasonable notice of the change. NLRB v. Johnson, 322 F.2d 216, 219-20 (6th Cir. 1963); NLRB v. Fletcher Co., 298 F.2d 594 (1st Cir. 1962).

It is respectfully submitted that, for this reason alone, the denial of Tidewater's application must be set aside and the proceeding remanded with appropriate instructions.

IV

THE COMMISSION HAS SO IGNORED RELEVANT AND MATERIAL FINDINGS OF FACT THAT TIDEWATER HAS BEEN DENIED THE FULL AND FAIR HEARING TO WHICH IT IS ENTITLED.

Following adoption of its 307(b) Suburban Policy, the Commission ordered Tidewater and Fischer to present additional evidence in response to the issues set forth in footnote 14, above. Tidewater's evidence was so detailed and extensive that, in addition to seven single spaced pages of the first Initial Decision incorporated by reference, ^{36/} the Examiner devoted ten single spaced pages, ^{37/} supplemented by an eight

^{36/} Paragraphs 11, 12, 13, 46 and 47 of the findings of fact of the first Initial Decision were incorporated by reference. (A. 77, 85, 7-8, 23-28).

^{37/} Paragraphs 17 to 30, inclusive, of the findings of fact of the Second Supplemental Initial Decision. (A. 78-88).

page appendix,^{38/} to the findings of fact under those added issues. Not one exception to a single sentence of those findings was filed, and not one sentence of those findings were deleted by the final Decision.^{39/} Yet the Commission concluded that Tidewater had not offered sufficient evidence to rebut the presumption that its station would be a Norfolk station.

A somewhat lengthy discussion is necessary to adequately illustrate the manner and extent to which most relevant and material evidence was ignored and other evidence distorted.

Needs and Characteristics of Smithfield: The findings of fact under this heading and issue consisted of one and a half pages of the Initial Decision (paragraphs 11, 12 and 13), and five and a half pages of the Second Supplemental Initial Decision (paragraphs 17 and 18). The latter findings were based upon the unchallenged testimony of 26 civic leaders and other residents of Smithfield and the immediately adjacent area. An example of the arbitrary and capricious manner in which the Commission treated those findings is contained in paragraph 10 of the Decision.

^{38/} Appendix A of Second Supplemental Initial Decision. (A. 97-105).

^{39/} See Footnote 10 of the Decision. (A. 109).

10. In support of its proposal, Tidewater presented the written testimony of some 26 civic leaders and other persons, who either live or work in Smithfield, to establish that Smithfield has separate and distinct needs for a local transmission service. Although each of those persons indicated ways in which a local radio station could be used for the benefit of Smithfield, many of them also stated that they had never requested the assistance of or used the facilities of existing stations in the area.

(A. 112-113). (Emphasis supplied).

First, the Commission gave absolutely no weight to the extensive findings of fact, occupying eight full pages of the Second Supplemental Initial Decision (Paras. 17-18), based upon the testimony of the 26 public witnesses concerning the needs of Smithfield and the surrounding area for a local radio station and transmission service, even though those findings were adopted by the Commission. Second, the statement that "they had never requested the assistance of or used the facilities of existing stations in the area" is so grossly erroneous as to be arbitrary and capricious. What stations in what area? There are none! The closest stations are 19 miles away in Newport News and 23 miles away in Norfolk. To reach either city from Smithfield requires paying a bridge toll. There is no local public transit system between Smithfield and either city. There is only one intercity bus a day

to Newport News and six a day to Norfolk.^{40/} These conclusions of the Commission have contaminated the entire Decision.

Extent to Which Existing Stations Are Meeting Smithfield's Needs: The Examiner devoted two full pages of the findings of fact of the Second Supplemental Initial Decision (paragraphs 20 to 28, inclusive) supplemented by an eight page appendix (Appendix A) to a detailed analysis of the manner to which existing stations are meeting Smithfield's needs. The procedures followed were described as follows:

21. Tidewater used two procedures in its effort to ascertain the service rendered by existing stations for and on behalf of organizations in the Smithfield community. First, the civic, charitable, agricultural, religious and service leaders of the community were asked (1) what offers of time or facilities had been received from existing stations, (2) what requests they had made for time on the facilities of existing stations, and (3) what use had actually been made of existing stations; and second, written interrogatories were submitted to the stations which provide a 2 mv/m signal to Smithfield and a 0.5 mv/m signal to the surrounding rural areas. (A. 85).

The Examiner reached the following conclusions:

6. Tidewater also offered evidence concerning the program service of the existing stations which provide a primary service signal to Smithfield and Isle of Wight County.

^{40/} The facts in this paragraph are set forth in paragraph 13 of the Initial Decision. (A. 8).

Such evidence shows that while each of the existing stations seems aware of its responsibility to serve all of its service area, none devotes any significant time or effort to serving the particular needs of Smithfield and Isle of Wight County. The Smithfield area service from existing stations is limited for the most part, to announcements of school closings due to weather conditions in the winter^{2/}, coverage of major, as distinguished from local or regional, news stories, a few public service announcements, and an occasional coverage of a local event. It is concluded that Tidewater has affirmatively established that the needs of Smithfield and Isle of Wight County for a local transmission radio service are not being properly met by existing stations.

- 2/ These announcements require a request via long distance telephone from the local school superintendent to the Norfolk station which furnishes the service. (A. 92).

After discounting the testimony of the 26 civic leaders, the Commission, in paragraph 10 of its Decision, concluded as follows:

Nonetheless, written interrogatories answered by several of the stations in the area around Smithfield demonstrate that the needs of that community had not been completely ignored. Station WGH, Newport News, states that it reports the scores of Smithfield athletic events and other school activities, broadcasts public service announcements on behalf of Smithfield organizations when requested, and announces school openings and closings upon request of the Smithfield Superintendent of schools. Station WRAP, Norfolk, states that it broadcasts information concerning weather and

driving conditions in Smithfield and Isle of Wight County during severe weather conditions and that it carries public service announcements for groups and organizations from both Smithfield and Isle of Wight County. Station WTAR, Norfolk, also carries announcements concerning Smithfield public service organizations, school closings, and driving conditions and states that it will broadcast directly from Smithfield on special occasions. Finally, each of the three stations asserts that significant Smithfield news is reported on its local newscasts. (A. 113).

But what is missing is far more significant. The responses to the written interrogatories, quoted verbatim in Appendix A of the Second Supplemental Initial Decision, establish (a) that not one of the stations was able to state that it devotes any appreciable time to local news of Smithfield and/or Isle of Wight County; (b) that not one of the stations maintains any news gathering facilities in the area; (c) that only one station broadcast any public service announcements on behalf of groups and organizations in Smithfield and/or Isle of Wight County in the seven days immediately preceding receipt of the interrogatories; (d) that no station broadcasts any religious programs or services from or on behalf of churches or religious congregations in Smithfield and/or Isle of Wight County; (e) that only one station presently broadcasts any programs of an educational nature from or on behalf of schools in Smithfield and/or Isle of Wight County, and that program

has had "some of the students in its studios participate" in weekly 25 minute program broadcast from September to May; (f) that not one of the stations had broadcast a single public affairs program in the last six months on topics specifically related and local to Smithfield and/or Isle of Wight County; (g) that none of the stations had broadcast a single editorial specifically relating to affairs in Smithfield and/or Isle of Wight County in the last six months; (h) that no candidates for local office in Smithfield and/or Isle of Wight County had used the facilities of any of the stations during the last general election campaign; (i) that no sporting events originating in or involving teams from Smithfield and/or Isle of Wight County had been broadcast during the last six months; (j) that only one instance of a local program originating from Smithfield and/or Isle of Wight County was cited by any of the four stations; and (k) that no instances of soliciting advertising in Smithfield and/or Isle of Wight County were given. (A. 97-105).

Yet the Commission concluded that the needs of Smithfield "had not been completely ignored"! One need only read the five and a half pages of findings of fact concerning the needs for a station to realize that the service provided by the existing stations has been practically non-existent. Yet the Commission concluded that no significant needs had been

shown! Is it little wonder that Tidewater argues the denial of its application was arbitrary and capricious?

Projected Sources of Revenue: The findings of fact of the Examiner, in paragraph 29 of the Second Supplemental Initial Decision, were so extensive and detailed as to require one and a half single spaced pages. (A. 87-88). The projections of revenue were based upon the experience of Tidewater's President in the operation of Station WESR at Tasley, Virginia, a rural community somewhat smaller than Smithfield; the President's familiarity with the area; lists of potential advertisers again based upon experience in broadcast station operations; and a report of the Smithfield Planning Commission entitled "Land Use, Population, and Economy", published by the office of the Governor of Virginia. (A. 87-88). The Examiner's conclusions, in paragraph 8, were so detailed that they occupy almost one full page of the Second Supplemental Initial Decision, and included the following:

The projected sources of advertising revenues from Smithfield and nearby areas (all situated on the west side of the James River), together with regional advertising, separate and distinct from that derived from metropolitan or urbanized areas, are sufficient to enable the proposed Tidewater station to operate as a small city and rural area station rather than as a large city station, and it is so concluded. (A. 93).

The Commission, in paragraph 11 of its Decision, reached the following conclusions:

Tidewater's estimate concerning potential revenues was based primarily upon the knowledge and experience of its president, Vernon H. Baker. No attempt was made to contact advertisers in Smithfield or in the surrounding rural areas to determine whether they presently advertise or whether they would be interested in purchasing advertising over a local radio station. Nonetheless, in spite of the fact that Isle of Wight County had annual retail sales of only \$12,025,000 during 1962, Baker estimated that approximately \$49,000 in advertising revenues would be obtained from businesses in Smithfield and the surrounding rural area during the station's first year of operation and that approximately \$21,000 would come from businesses selling their products throughout the metropolitan area. (A. 113).

Reference to the fact that "no attempt was made to contact advertisers in Smithfield or in the surrounding rural areas" was arbitrary and capricious because there was no evidence in the record that there were any advertisers, at least on radio. In response to interrogatories to the four stations providing primary service to Smithfield concerning solicitation of advertising in Smithfield and/or Isle of Wight County, two replied that they do not solicit, one replied "not regularly", and the fourth refused to answer. In addition, none of the stations providing primary service to the rural area of the county stated that they solicit advertising in the area. (A. 105).

The relevancy of the statement in paragraph 11 of the Decision to the effect that, "in spite of the fact that Isle of Wight County had annual sales of only \$12,025,000 during 1962, Baker estimated that approximately \$49,000 in advertising revenues would be obtained from businesses in Smithfield the urban center of the county and area and the surrounding rural area," is not shown. (A. 113). Surely, an estimate that the local advertising on the station would be only 0.4% of the retail sales does not prove any inflated estimate. If anything, it shows the extreme conservatism exhibited by Tidewater. That it must have had some relevance, however, is indicated by the following conclusion in paragraph 17 of the Decision:

Since Tidewater's proposal, serving virtually all of the metropolitan area with at least some programming of general interest on the highest powered station in the area, would be extremely attractive to regional and national advertisers, we can give very little weight to Tidewater's unsupported assertion that Smithfield and Isle of Wight County businesses would provide adequate revenues to support its station.

(A. 117). (Emphasis supplied).

One need only glance at the findings in paragraph 29 of the Second Supplemental Initial Decision, which were not modified by the Decision, to see how arbitrary is the statement of "unsupported assertion."

The foregoing are excellent examples of how facts which do not support a particular conclusion can be ignored and

distorted. Yet it was upon such conclusions that Tidewater's application was denied. Is it little wonder that Tidewater is yelling "Foul"?

V

THE DECISION IS INCOMPATIBLE WITH THE
DECISION ADOPTED THE SAME DAY IN
MONROEVILLE BROADCASTING COMPANY.

The decision in the companion case, Monroeville Broadcasting Company, 12 FCC 2d 359, 12 Pike & Fischer RR 2d 946 (1968), was issued the same day as the Decision in this case. There, the Commission denied the application of Miners for failure to submit evidence to meet the 307(b) Suburban Policy issues, thereby automatically compelling the conclusion that Miners had failed to rebut the presumption that it would be a central city station. With respect to the Monroeville application, the Commission concluded that Monroeville had successfully rebutted the presumption.

A study of the two Decisions has developed some most interesting comparisons of the manner in which similar facts were treated.

In paragraph 17 of its Decision here, the Commission concluded:

17. We recognize that Smithfield has separate and distinct programming needs,^{23/} but the record also demonstrates that, although present service could undoubtedly
(Continued on next page.)

(Cont'd.)

be improved, the needs of the relatively small population of Smithfield are not being ignored by the existing stations. (A. 117).

23/ The facts that Smithfield is located in a predominately agricultural area and is physically separated from the metropolitan area makes our present determination under the 307(b) Policy Statement unusually important, since a metropolitan area reception service would not likely remain responsive to those specialized needs.

Compare the following handling of the same subject in Monroeville, keeping in mind that Monroeville is almost contiguous to Pittsburgh, in the Pittsburgh Metropolitan Area, and in the same county as Pittsburgh, and that the Pittsburgh stations are readily accessible as compared to the stations closest to Smithfield:

19. ... Monroeville has shown: (a) that Monroeville is a young community whose population growth is almost explosive; (b) that this 186% growth rate must be contrasted with Pittsburgh's 10.7% drop in population during the same 1950-1960 period; and (c) that the problems of a young smaller-growing community like Monroeville are different from those of the larger, older, more stable community of Pittsburgh. The applicant has submitted the necessary data to support that contention. The school system is still fairly new and needs publicity and programming. Local organizations, many of which are small, and many of which are new, need public service announcements and programming support. Local clergymen need an outlet for spiritual expression. Balancing the favorable showing that Monroeville has made under issue (a)(1) against the evidence that demonstrates the

needs which are commonly shared between Pittsburgh and Monroeville, it is found as an ultimate fact that Monroeville has made a sufficient showing under that issue.

20. Under remanded issue (a) (2), the extent to which the distinct and separate needs found pursuant to (a) (1) are being met by existing standard broadcast stations, Monroeville has shown that there is no other station with an above average sensitivity to the needs of the city of Monroeville. Several stations, KDKA, WEEP, KQV, WKPA, WMCK, do show a general concern with the overall needs of Monroeville, but it is a concern for just one of the many communities in their service areas. Under remanded issue (a) (3), the extent to which its programming proposal will meet the specific, unsatisfied needs of its station location, Monroeville has shown a meaningful sensitivity to the needs of the city of Monroeville. The showing, based on Monroeville's amended program proposal, include news, traffic and weather reports, a calendar of local community events, church meetings, and service club projects, a short daily school news program, an hour-long weekly educational program, discussion and religious programs, and public service announcements.

(Emphasis supplied).

Attention is respectfully directed to that fact that in the Monroeville decision, the Commission specifically discussed the showings made and the conclusions reached under 307(b) Policy issues (a) (1), (a) (2) and (a) (3), while in this case the Commission attempted no such discussions and conclusions.

In Monroeville, the Commission stated that "Monroeville has shown that there is no other station with an above average sensitivity to the needs of the city of Monroeville?" (Emphasis

supplied). Why was not a similar conclusion reached in Tidewater when the record shows the stations are 9 and 23 miles away, rather than 10 to 11 miles as in Monroeville, and when the findings of fact show far less service by existing stations for Smithfield than for Monroeville?

In Monroeville, the Commission stated that the existing stations show a "general concern with the overall needs of Monroeville" (Emphasis supplied), while no such conclusion adverse to the applicant was or could have been made with respect to Smithfield. Yet the Commission concluded, in effect, that the needs of Smithfield "had not been completely ignored."

In Monroeville, the Commission found, in paragraph 18, that "the community of Monroeville is dependent to some degree on Pittsburgh's political, social, and economic institutions and is considered in some respects to be a satellite community." In paragraph 16 in the Decision here, the Commission stated that "the community of Smithfield and Isle of Wight County are clearly independent of the overall metropolitan area because of the geographical characteristics of the area."

With respect to projected sources of revenue, Issue (a)(4), the Commission merely said in Monroeville that "Monroeville showed that the substantial number of businesses in the city of Monroeville could be expected to provide approximately 75% of the advertising support." In this case, Tidewater projected

70% from local advertisers. (A. 87-88).

The inescapable conclusion is that the only facts given any meaningful consideration by the Commission in the two cases was the power proposed. In Monroeville, it was 250 watts. Here it was 10 kilowatts. Why bother to hold a hearing when evidence favorable to the high power applicant will be downgraded, distorted and ignored.

VI

THE ULTIMATE CONCLUSION THAT THE FAIR, EFFICIENT, AND EQUITABLE DISTRIBUTION OF RADIO SERVICE WOULD BE BEST SERVED BY DENIAL OF TIDEWATER'S APPLICATION WAS ARBITRARY AND CAPRICIOUS.

The provisions of Sections 1 and 307(b) of the Communications Act are set forth on page 41, above. Each of those sections refer only to providing service. Yet the Commission, in paragraph 18 of its Decision, concluded affirmatively that the objectives of the Act, to "provide a fair, efficient, and equitable distribution of radio service to" the several states and communities will be achieved by denial of both applications:

For the reasons set forth above, we conclude that the fair, efficient, and equitable distribution of radio service and the public interest, convenience and necessity would be best served by denial of both Fischer's and Tidewater's applications. (A. 118).

Never has a more arbitrary and capricious conclusion been reached by the Commission!

VII

SUMMARY

Some of the most difficult hearing cases before the Commission over a period of more than twenty years have involved a choice under Section 307(b) of the Communications Act between mutually exclusive standard broadcast applications for different communities when at least one of the communities has been a suburb of a much larger central city. A few of the cases have been complicated by questions as to whether the suburban community was specified as the station location because of (1) a genuine desire to provide a local outlet, i.e., transmission service, for that community, (2) an attempt to obtain a Section 307(b) advantage over other applications, or (3) inability to satisfy the technical requirements for assignment to the central city. Non-mutually exclusive applications for suburbs of central cities posed few problems as evidenced by the grant of some hundreds without hearings since World War II.

The avoidance of a Section 307(b) determination and the selection of one of the mutually exclusive applicants upon a comparison of qualifications and proposals under special circumstances received this Court's approval in 1951 in Huntington Broadcasting Co. v. Federal Communications Commission,

supra. However, fourteen years later, in Miners Broadcasting Service, Inc. v. Federal Communications Commission, supra, this Court rejected an extension of the Huntington rule in a manner which would bring about a denial of an application by withdrawal of both Section 307(b) and comparative rights, and suggested the adoption of standards to assist in resolving cases involving mutually exclusive applications in which at least one specified as the station location a suburb of a central city.

The Commission moved promptly to develop and adopt standards for such cases as suggested by the Court. Instead of proceeding by a rule making proceeding looking toward adoption of definitive rules, the Commission chose to adopt a policy by inviting the suggestions of parties to three multiple application suburban cases. The order initiating the proceeding referred only to the problem and other cases involving mutually exclusive applications, at least one being for a suburban community. Monroeville Broadcasting Company, 1 FCC 2d 319, 5 Pike & Fischer RR 2d 547 (1965). On December 27, 1965, the Commission issued its Policy Statement On Section 307(b) Considerations For Standard Broadcast Facilities Involving Suburban Communities, supra. The text, as well as the title, indicated only that the policy was intended to apply to cases involving mutually exclusive applications for different

communities, at least one a suburb of a central city. By definition, a central city was one with a population of 50,000 or greater and with a population more than twice that of the specified suburban community.

Somewhere along the line, just exactly when is not apparent, the decision was made to apply the policy to non-mutually ^{41/}exclusive applications. There followed a series of initial decisions in which Hearing Examiners, almost without exception, concluded that the suburban applicants had successfully rebutted the presumption of the policy. The first cases involving mutually exclusive applications to reach the Commission were Monroeville and this case. Because of their ancient vintage, each by-passed the Review Board which had been created long after the hearings had begun. The decisions of the Commission here and in Monroeville each denied 10 kilowatt applications and, in Monroeville, granted a low power application.

It is evident from the manner in which the 307(b) Suburban Policy and the evidence in this case have been applied, that the Commission has adopted a policy of not granting any suburban

^{41/} The decision may have been made by the Commission's Review Board in Northern Indiana Broadcasters, Inc. 2 FCC 2d 938, 7 Pike & Fischer, RR 2d 533, adopted March 10, 1966, a case involving a single applicant, the Review Board added 307(b) Suburban Policy issues. That case has not yet reached this Court.

application which proposes more than minimal power even though the proposal fully satisfies every applicable rule of the Commission. By use of the rebuttable presumption approach, the Commission, after considering the evidence, need only say, "Sorry, not enough evidence, we are not persuaded." With no standards or guidelines established, there appears to be no tests which may be applied by the reviewing Court to determine if a complaint of arbitrary action by the Commission is well founded.

The end result has been remarkably similar to that in Miners which led to the remand because the policy "creates, rather than destroys, inequities."

The Commission was established for the purpose of providing, "so far as possible, to all of the United States, a rapid efficient, nationwide and world-wide wire and communications service." Section 1. That purpose is to be achieved by granting applications in a manner as to provide a "fair, efficient, and equitable distribution of radio service" to each of the several states and communities. Section 307(b). Service only can be provided by the grant of applications followed by the construction and operation of the authorized stations. The Commission has yet to explain how service can be provided and the "fair, efficient, and equitable distribution

of radio service" achieved by the denial of an application which satisfies every applicable rule of the Commission.

VIII

CONCLUSIONS

This Court is respectfully requested to rule that the 307(b) Suburban Policy may not be applied so as to deny an application which meets every applicable rule of the Commission, to set aside the Decision denying the application of the Tidewater Broadcasting Company, Incorporated, and to remand this case to the Commission for further action in light of the opinion in this appeal and in the companion appeal of Fischer, Case No. 21,942.

Respectfully submitted,

ROBERT M. BOOTH, JR.
Attorney for Appellant
The Tidewater Broadcasting
Company, Incorporated

Of Counsel

Booth & Freret
1150 Connecticut Avenue, N.W.
Washington, D.C., 20036

January 8, 1968

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

B
FCC 65-590
69581

In re Applications of)

MONROEVILLE BROADCASTING COMPANY)
Monroeville, Pennsylvania)

DOCKET NO. 14082
File No. BP-13840

MINERS BROADCASTING SERVICE, INC. (WBMA))
Ambridge-Aliquippa, Pennsylvania)

DOCKET NO. 14088
File No. BP-13855

For Construction Permits

MEMORANDUM OPINION AND ORDER

By the Commission: Commissioner Cox not participating.

1. Before us for consideration is the opinion of the United States Court of Appeals for the District of Columbia Circuit in Miners Broadcasting Service, Inc. v. Federal Communications Commission (Case No. 18492) decided June 17, 1965, remanding this matter for further proceedings. The Court of Appeals' action resulted from an appeal by Miners from our Decision, 35 F.C.C. 657(1963), in which we granted the application of Monroeville Broadcasting Company for a construction permit for a new standard broadcast station and denied the competing application of Miners. In our Decision, we held that the Monroeville application was entitled to a decisive preference under Section 307(b) of the Communications Act because proposed recipients of its service have a greater need therefor than would the recipients of the service proposed by Miners. The Court of Appeals held that our Decision failed to give an adequate explanation of the reasons for our 307(b) preference of the Monroeville application.

2. Applications for review of Review Board Decisions in the Matawan, New Jersey, standard broadcast proceeding (FCC 65R-23, Docket Nos. 14755-14757) and in the Costa Mesa-Newport Beach, California, standard broadcast proceeding (FCC 65R-185; Docket Nos. 15752-15766), presently pending before us, also involve, in part, our overall 307(b) policy. Since such policy is a matter of fundamental importance, we believe it is appropriate to permit argument so that the parties in each of these proceedings may address themselves to the question of what standards should be applied in order to determine which application would better serve the public interest by providing a fair, efficient, and equitable distribution of radio service when one or more of the applicants is to be located in a suburban community and proposes to serve adjacent urbanized areas.

3. Accordingly, we shall schedule oral arguments in this, as well as in the Matawan and Costa Mesa proceedings, in order that we may have a broad range of views to assist us in specifying and clarifying our 307(b) standards. The parties will be permitted, in their briefs and at

the oral argument, to discuss the 307(b) aspects of their respective proceedings in the light of Court of Appeals, Commission, and Review Board treatment of this subject in the following Decisions:

- a. Huntington Broadcasting Co., 5 R.R. 721 (1950), rehearing denied, 6 R.R. 569 (1950), affirmed, 89 U.S. App. D.C. 222, 192 F. 2d 33 (1951);
- b. Radio Crawfordsville, Inc., 34 F.C.C. 996, 25 R.R. 533 (1963), reconsideration denied, 35 F.C.C. 438, 25 R.R. 1001 (1963);
- c. Speidel Broadcasting Corp. of Ohio, 35 F.C.C. 74, 25 R.R. 723 (1963), reconsideration denied, 35 F.C.C. 755, 1 R.R. 2d 726 (1963), affirmed per curiam, 2 R.R. 2d 2094 (1964);
- d. Monroeville Broadcasting Co. 35 F.C.C. 657 1 R.R. 2d 607 (1963), reconsideration denied, 36 F.C.C. 296, 1 R.R. 2d 993 (1964), remanded sub nom., Miners Broadcasting Service, Inc., v. Federal Communications Commission, Case No. 18,492, decided June 17, 1965;
- e. Rockland Broadcasting Company, 36 F.C.C. 303, 2 R.R. 2d 39 (1964), reconsideration denied, 36 F.C.C. 1510, 2 R.R. 2d 820 (1964), affirmed, sub nom., Bacre v. Federal Communications Commission, Case No. 18,956, decided June 10, 1965, 5 R.R. 2d 2070 (1965);
- f. Burlington Broadcasting Co., 34 F.C.C. 1135, 25 R.R. 633 (1963);
- g. Massillon Broadcasting Company, 36 F.C.C. 809, 2 R.R. 2d 409 (1964);
- h. Seven Locks Broadcasting Co., 37 F.C.C. 82, 3 R.R. 2d 177 (1964);
- i. Charles W. Jobbins, Docket No. 15752, FCC 65R-185, released May 24, 1965; and
- j. Radio Haddonfield, Inc., 37 F.C.C. 162, 3 R.R. 2d 25 (1964).

4. While each of these proceedings involves issues other than the 307(b) matter with which we are presently concerned, the parties are requested to limit their briefs and arguments to basic 307(b) policy questions. Additionally, the parties may wish to address themselves to the question of whether the Monroeville and Mataman proceedings should be remanded for the taking of additional evidence upon the 307(b) issue in order to determine which of the applications should be preferred in those proceedings.

5. We take this opportunity to point out that we have no such "underlying policy" as that to which the Review Board referred in its Decision in the Matawan proceeding, namely, "to limit to suburban communities of 50,000 or less the case-by-case consideration of whether proposals for the suburban communities 'should be regarded as proposing a new service for their nominal community or whether, instead, the proposal should be regarded as an application for the central city.'"

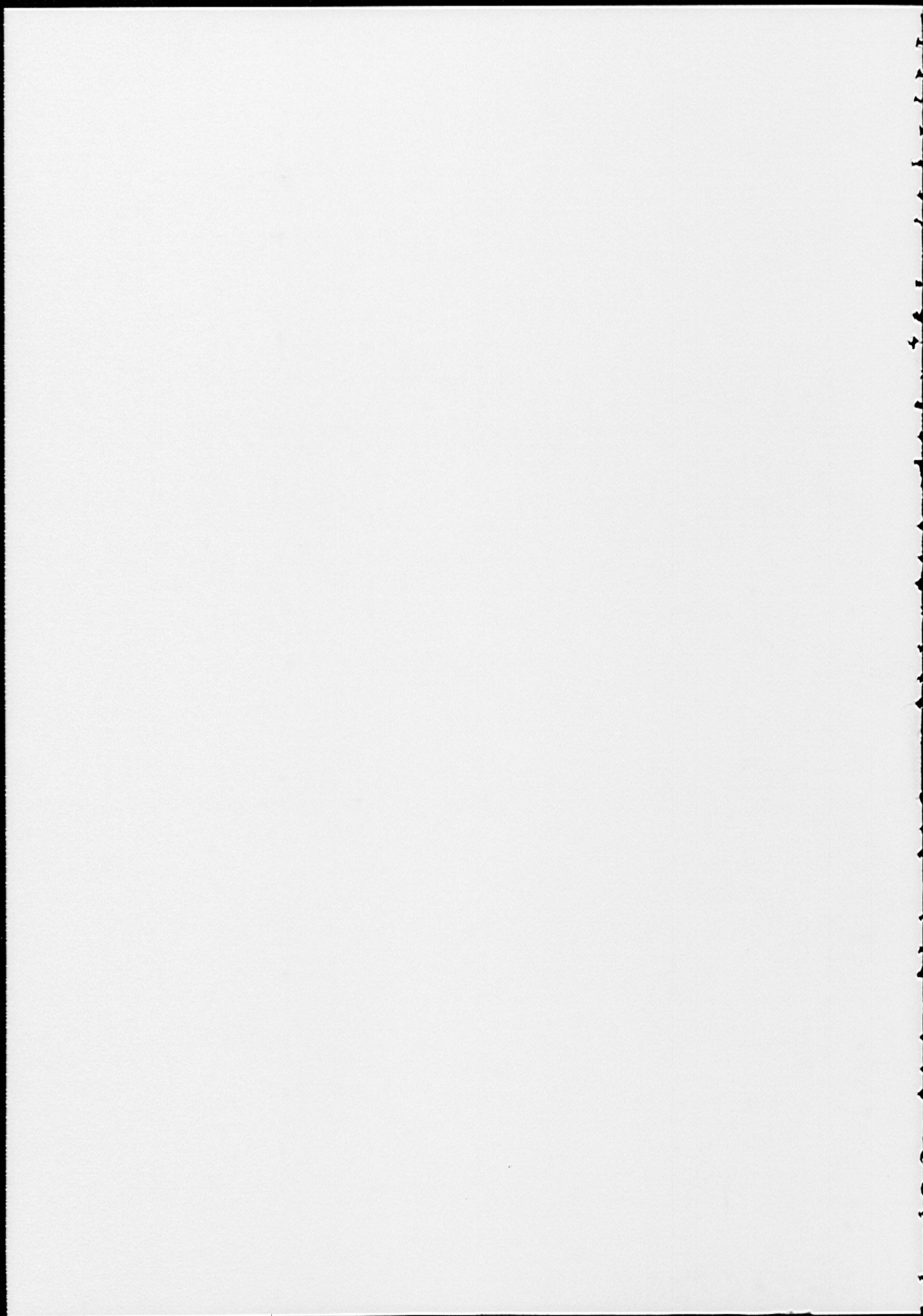
ACCORDINGLY, IT IS ORDERED, That the parties in this proceeding may file briefs on or before August 9, 1965, directed only to the questions raised herein, and reply briefs on or before August 23, 1965; and that oral argument IS SCHEDULED before the Commission, en banc, on October 1, 1965, beginning at 10:00 a.m. The parties herein, who, within five days after the release of this Memorandum Opinion and Order, file written notice of intention to appear and participate, shall each be allowed twenty minutes for oral argument.

FEDERAL COMMUNICATIONS COMMISSION

Ben F. Waple
Secretary

Adopted: July 7, 1965

Released: July 9, 1965



FEDERAL COMMUNICATIONS COMMISSION



WASHINGTON, D. C. 20554

FCC 65-1153

77133

PUBLIC NOTICE

December 27, 1965

POLICY STATEMENT ON SECTION 307(b) CONSIDERATIONS FOR
STANDARD BROADCAST FACILITIES INVOLVING SUBURBAN COMMUNITIES

By the Commission:

1. On July 9, 1965, we released our Memorandum Opinion and Order (1 F.C.C. 2d 319, 5 R.R. 2d 547) stating that oral arguments would be held in three separate proceedings in order to consider the question of what standards should be applied to determine which application would better serve the public interest by providing a fair, efficient, and equitable distribution of standard broadcast service when one or more of the proposed stations is to be located in a suburban community and would serve adjacent urbanized areas. Those oral arguments were scheduled, in part, as a result of the opinion of the United States Court of Appeals for the District of Columbia Circuit in Miners Broadcasting Service, Inc. v. Federal Communications Commission, 349 F. 2d 199, 5 R.R. 2d 2086 (1965), in which the Court stated that we should establish or clarify the standards used to distinguish between two suburban applicants, both of whom propose to serve some parts of their central city and urbanized area. Additionally, we have been aware that a number of cases involving the same problem are in various stages of our hearing processes.

2. The briefs and arguments of the parties in the oral arguments on October 8, 1965, have been valuable in ascertaining the scope of the suburban question and in clarifying our thinking on that question. We appreciate the assistance of all of the parties who participated in those arguments and who provided many helpful comments. Most of the parties were in agreement that our standards for suburban applications should be specified so that each applicant would be on notice of what general standards would be applied to his application and so that the applicant would have an opportunity during the course of the hearing to show how these general standards should be applied to his application. Upon consideration of all of the relevant material presented at those oral arguments, we are of the view that the public interest would be better served by the promulgation of a new policy, specified herein, which would hereafter provide assistance in the allocation of AM stations in suburban communities.

(over)

The Present Problem Concerning Suburban Applications

3. In our Notice of Proposed Rule Making regarding AM station assignment standards, FCC 63-468, 25 R.R. 1615, we redefined our historic goals for allocation of AM broadcast service. As redefined, our objectives, listed in descending order of priority, are, insofar as each is consistent with those preceding it: (a) to provide unimpaired service within the normally protected contours of new and existing standard broadcast facilities; (b) to provide a primary aural service to areas lacking that service; (c) to provide a first, local aural service to as many independent communities as possible; and (d) to provide multiple, local aural services to as many independent communities as possible. We have previously indicated that, when two or more applications for different communities are mutually exclusive, a choice among them, pursuant to Section 307(b) of the Communications Act, requires comparative consideration of such factors as: (a) the areas and populations to be provided a new transmission and reception service, and (b) the number of existing transmission and reception services available to those areas and populations. See, for example, Kent-Ravenna Broadcasting Co., FCC 61-1350, 22 R.R. 605 (1961).

4. In Kent-Ravenna, we noted that the implementation of the above criteria had become increasingly complicated because of the rising number of applications for suburban communities, which would be entitled to a first transmission service preference in a comparative hearing. Pointing out that competing applicants often sought to show that the suburb was not a community separate from its central city and thus did not have that identity of interest to deserve a first transmission service, we held that such questions would be part of the overall 307(b) issue. This approach permitted the presiding Examiner to determine which facets of the suburban problem should be explored in the hearing, and to compare the applications under the usual 307(b) criteria, if each of the applicants proposed to serve separate communities. However, it soon became apparent that the suburban problem could not be resolved by the simple determination of whether the proposed suburb was a separate community from its central city, since virtually all suburban communities have their own political, civic, and social institutions. Radio Crawfordsville, Inc., 34 F.C.C. 996, 25 R.R. 533 (1963).

5. In Crawfordsville, we held that the threshold question requiring resolution is whether the needs of the suburban community are to be considered apart from those of its nearby central city or the urbanized area as a whole, in light of the class, frequency, power, and coverage proposed by the suburban applicant. Thus, a high-powered suburban proposal with substantial coverage of the central city and surrounding area was held to be an application for the central city in the 307(b) comparison. However, we also indicated that the needs of a suburb would be considered apart from those of the central city, if the applicant proposed low power and only minimal coverage of the central city and surrounding area.

6. At the same time, as part of our proposed revision of the AM station assignment standards, supra, we considered another approach to the suburban problem. Noting that we wish to encourage new stations which will provide a genuine local service for growing suburban communities, while discouraging new suburban facilities which are merely sub-standard central city stations, we proposed a rule which would have precluded grants providing a multiple service for a large community while ostensibly providing a first local service for a nearby suburb. As proposed, the rule provided that no new AM station would be authorized for a community under 50,000 persons, if the proposal would place a signal of 2 mv/m or greater over more than 25% of the area within any other community of 50,000 or more persons. After receiving comments from interested parties, we concluded that the proposed solution to the suburban problem would produce undesirable results in too many cases to justify its adoption. FCC 64-609, 2 R.R. 1658 (1964). Pointing out that new stations assigned on low frequencies, in areas of high ground conductivity, would have to be located an unreasonably long distance from urbanized areas in order to avoid the adverse thrust of the rule, we stated that suburban applications would be closely examined on a case-by-case basis to determine whether they should be regarded as proposing a new service for their nominal communities or their central cities.

7. After considerable reflection, however, we have become convinced that the Crawfordsville approach to the suburban problem as summarized in paragraph 5, supra, is not satisfactory either. As applicants for suburban communities have argued, the Crawfordsville rationale requires that their high-powered proposals be considered as ones for the central city even though they do not comply with the principal city service provisions of Section 73.188(b), which would be demanded of applications for that city. At the same time, it may be clear that such a suburban applicant will provide main studios and some local programming for his specified community, even though it may be regarded by us as an application for the central city. Since the suburban applicant will fulfill, in some measure, that community's need for a local transmission service, we are now persuaded that the provision of a proposed transmission service for his specified suburban community cannot be overlooked in the 307(b) comparison of competing applications. Each of these factors reinforces our conclusion that a new approach to the suburban problem must be explored.

New Policy Concerning Suburban Applications

8. We are convinced that the objective evidence of an applicant's proposed coverage, which reflects the engineering factors of ground conductivity, frequency, and power, is sufficient to raise a question as to whether the proposal will be a realistic local transmission service for its specified community or merely another reception service. Our experience compels us to conclude that as their power and coverage are increased to serve larger numbers of persons, stations in metropolitan areas often tend to seek out national and regional advertisers and to identify themselves

(over)

with the entire metropolitan area rather than with the particular needs of their specified communities. For these reasons, it will be our policy in the future under Section 307(b) to examine every application for new or improved standard broadcast facilities to determine: (1) whether the applicant's proposed 5 mv/m daytime contour would penetrate the geographic boundaries of any community with a population of over 50,000 persons and having at least twice the population of the applicant's specified community. When such a condition is found to occur, a presumption will arise that the applicant realistically proposes to serve that larger community rather than his specified community. Where the test described above indicates penetration of each of two or more larger communities, the presumption will apply with respect to the largest of those communities. If that presumption cannot be rebutted on the basis of the material included within the application, an evidentiary hearing will be held to determine whether the application should be treated as a proposal for the applicant's specified community or for some larger community.

9. This new policy is intended to provide an accommodation of heretofore apparently conflicting allocation considerations. While we still wish to discourage any proposal that will be merely a sub-standard central city station, we are persuaded that many developing and deserving suburban communities should be afforded an opportunity to obtain a first local transmission service. Moreover, while we wish to encourage each applicant to propose as much power as he will need to comply with our allocation rules, every applicant who falls within our test will be required to demonstrate that his proposal is designed to provide a realistic local transmission service for his specified community. We are convinced that reliance upon the applicant's proposed coverage is a reasonable basis for initiating inquiry into that applicant's intent, since the propagation of a 5 mv/m daytime signal into a community of at least 50,000 persons and over twice as large as the applicant's specified community generally results in the propagation of a competitive signal over a heavily populated area of substantial size, and since service to such an area has often led to our licensees' serving the transmission and reception needs of that area rather than the transmission needs of their specified communities.

10. During the course of an evidentiary hearing to determine, inter alia, whether an applicant will realistically serve his specified community or another, larger community, that applicant will be required to rebut the presumption that will have arisen because of his proposed coverage. Thus, in addition to the usual 307(b) evidence concerning the independence of a suburb from its central city, an applicant will be expected, under our new policy, to adduce evidence at the hearing showing the extent to which he has ascertained that his specified community has separate and distinct programming needs. The parties will then be permitted to show the extent to which that community's

needs are being met by existing standard broadcast stations, and the applicant will be expected to show the extent to which his program proposal will meet the specific, unsatisfied programming needs of his specified community. At the same time, although it would not necessarily be determinative, such an applicant would be expected to adduce evidence as to whether the projected sources of advertising revenues within his specified community are adequate to support his proposal as compared with the sources from all other areas.

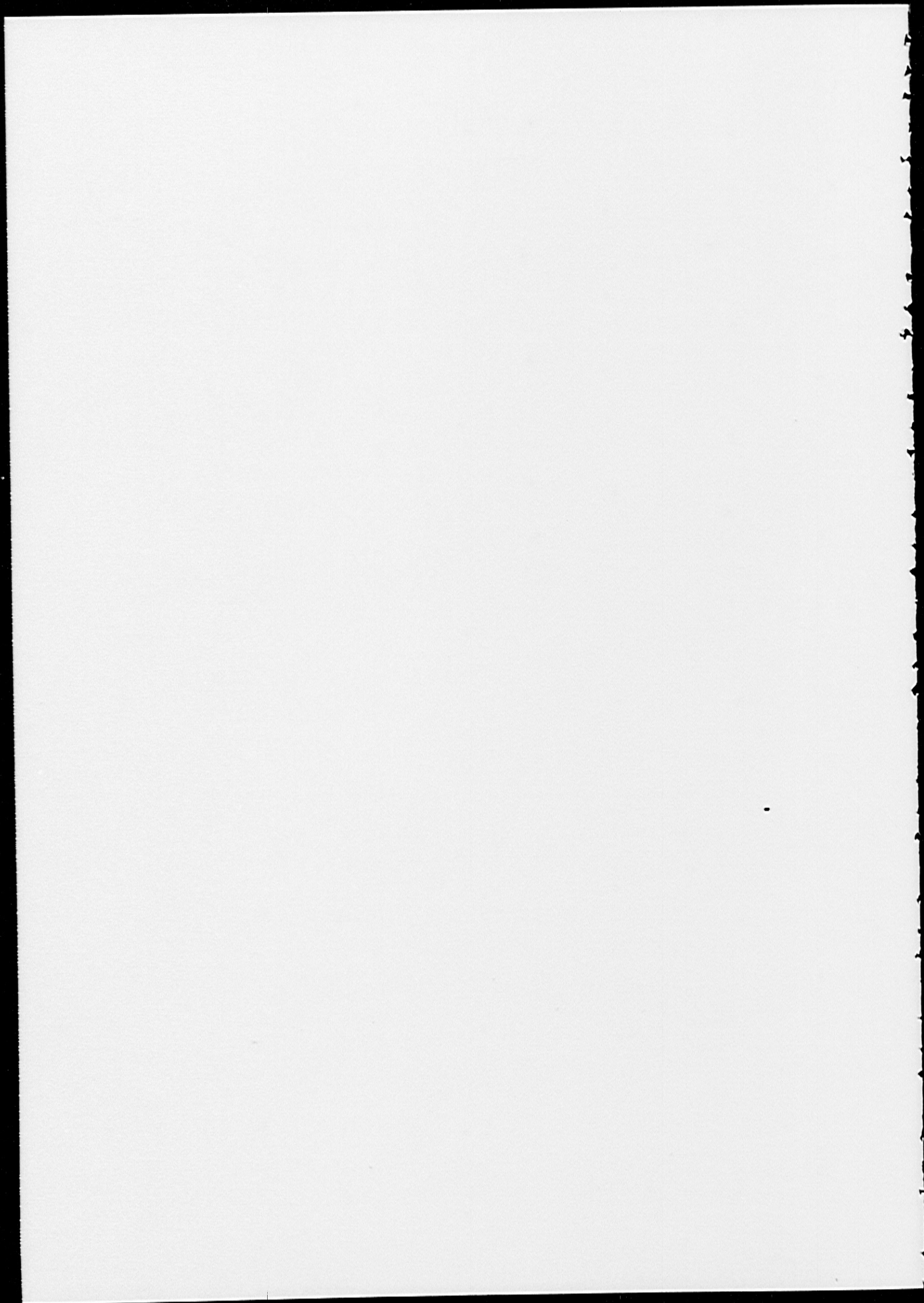
11. If an applicant sustains his burden under the specified issues and rebuts the presumption, he will be treated as an applicant for his specified community and accorded all of the 307(b) considerations which flow therefrom. However, if the applicant fails to rebut the presumption, he will be treated as an applicant for the larger community and required to meet all of the technical provisions of our Rules, including Sections 73.30, 73.31, and 73.188(b)(1) and (2), for stations assigned to that larger community. 1/ An applicant who meets those technical requirements will be permitted to prosecute his proposal as if he were an applicant for that larger community. However, he will be accorded only the 307(b) preference to which that larger community is entitled and will be granted only upon the condition that he amend his application to specify the larger community as his station location. The application of an applicant who fails to rebut the presumption and fails to meet all of the technical requirements for that larger community will be denied.

12. We are persuaded that the public interest requires the application of this policy to all pending applications as well as to those filed in the future, whether opposed or not, since it will materially assist us in making fair, efficient, and equitable allocations of standard broadcast facilities in metropolitan areas. In those instances when the presumption would not arise, because the applicant's proposed contours do not extend far enough or because the larger community lacks the required population, interested parties may, of course, petition to designate the application for hearing or to enlarge the issues of an already scheduled hearing, and such petitions will receive favorable consideration, if the petitioner makes a threshold showing that the proposal will realistically serve primarily a community other than his specified community.

- FCC -

Adopted: December 22, 1965

1/ When an applicant for community A, who falls within our test of presumed service set forth in paragraph 8, supra, for larger community B and also for still larger community C, fails to establish that he will realistically serve his specified community A, but demonstrates that he will realistically serve larger community B, he will be required to meet the technical provisions of our Rules and the other requirements of this paragraph only for larger community B, not also for still larger community C.



Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

FCC 66-229
80171

In re

POLICY STATEMENT ON SECTION 307(b)
CONSIDERATIONS FOR STANDARD BROADCAST
FACILITIES INVOLVING SUBURBAN COMMUNITIES

MEMORANDUM OPINION AND ORDER

By the Commission: Commissioner Bartley absent.

1. On December 27, 1965, we released a Public Notice (2 F.C.C. 2d 190, 6 R.R. 2d 1901) entitled Policy Statement on Section 307(b) Considerations for Standard Broadcast Facilities Involving Suburban Communities, in which we set forth our views on the standards that should be used to evaluate suburban applicants which propose to serve some parts of their central city and urbanized area. We now have before us petitions for reconsideration of that Policy Statement filed by Tinker Area Broadcasting Co., Southington Broadcasters, and Boardman Broadcasting Company, Inc. In addition, Boardman has filed a motion for stay of the effectiveness of the Policy Statement. Each of the petitioners is an applicant for a construction permit for a new standard broadcast station and claims that its interests will be adversely affected by the application of the Policy Statement to its proposal.

2. Initially, Boardman has not attempted to show that it will suffer irreparable injury or that the public interest will be adversely affected if the Policy Statement is not stayed. Under these circumstances, good cause has not been shown for staying the effectiveness of the Policy Statement. Cf. Alvin B. Corum, Jr., FCC 65-355, 5 R.R. 2d 18 (1965). Accordingly, Boardman's motion for stay of the Policy Statement will be denied.

3. Petitioners assert that our Policy Statement modified and amended the legal standards for the assignment of standard broadcast stations and that our action stating a new policy for suburban applications amounts to substantive rule making. Petitioners then argue that we must comply with the provisions of the Administrative Procedure Act before we can adopt fixed standards for the assignment of broadcast stations and that the Policy Statement violates Section 4 of the Administrative Procedure Act since we did not give notice or permit all interested parties to comment upon the proposal. Petitioners request that we return to a case-by-case approach to 307(b) considerations for suburban applications, since the Policy Statement gives no weight to factors, such as directional operation and high conductivity, which rebut the presumption that an applicant realistically proposes to serve a community other than his specified station location. Finally, petitioners urge that, even if it is valid, the Policy Statement should not be

applied to pending applications.

4. In the Policy Statement we stated that, where an applicant's proposed 5 mv/m daytime contour would penetrate the geographic boundaries of any community with a population over 50,000 and twice the population of the applicant's specified community, a presumption will arise that the applicant proposes to serve the larger community rather than his specified community. We then asserted that, if the presumption could not be rebutted by material in the application, an evidentiary hearing would be held to determine whether the application should be treated as a proposal for the specified community or for some other larger community. We also stated that an applicant will be permitted during the course of such a hearing to rebut the presumption on the basis of evidence of his projected programming and revenues.

5. Thus, the Policy Statement does not make a conclusive determination as to which community a suburban applicant realistically proposes to serve, but merely raises a presumption which may be rebutted during the course of an evidentiary hearing. For this reason, the Policy Statement simply announced new guidelines to govern future hearings involving suburban applications without establishing any substantive provisions for the grant or denial of any of the applications. Since general statements of policy, such as this, are specifically excluded from the notice and effective date requirements of Section 4 of the Administrative Procedure Act, we are convinced that there is no impropriety or infirmity in our adoption of this new approach for suburban applications and that there is no necessity to institute rule making proceedings.

6. By the same token, we are also persuaded that there is no reason to return to an earlier approach in our 307(b) evaluation of suburban applications or to limit the Policy Statement's effect to new applications. The approach outlined in the Policy Statement will materially assist us in making fair, efficient, and equitable allocations of standard broadcast facilities in metropolitan areas by providing concrete evidence as to which communities the applicants realistically propose to serve and by permitting a more realistic evaluation of the comparative need which each of the applicants proposes to serve.

7. At this time we also wish to make clear that evidence with respect to directional operation, ground conductivity, and other similar factors will be given weight under the Policy Statement's new approach. We explicitly noted, in paragraph 8 of the Policy Statement, that an applicant could rebut a presumption with respect to a larger community by the information submitted with his application. Since the purpose of our new approach is to determine whether an applicant will realistically serve his specified community or another larger community, we are persuaded that the type of evidence required to rebut such a presumption will necessarily differ, depending upon, among other variable factors, the applicant's proposed power, antenna directionalization and coverage. Thus, if, prior to designation for hearing or during the course of a

hearing, an applicant shows that his coverage is extended by factors beyond his control (e.g., soil conductivity, the need to protect existing stations, etc.), such facts will be considered in determining whether the presumption has been rebutted.

ACCORDINGLY, IT IS ORDERED, This 9th day of March, 1966, That the above-described motion for stay filed by Boardman Broadcasting Company, Inc., IS DENIED; and

IT IS FURTHER ORDERED, That the above-described petitions for reconsideration, filed by Tinker Area Broadcasting Co., Southington Broadcasters, and Boardman Broadcasting Company, Inc., ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Ben F. Waple
Secretary

Released: March 10, 1966



FEDERAL COMMUNICATIONS COMMISSION



WASHINGTON, D. C. 20554

FCC 68-624

16642

PUBLIC NOTICE - B

June 13, 1968

CLARIFICATION OF POLICY STATEMENT ON SECTION 307(b) CONSIDERATIONS
FOR STANDARD BROADCAST FACILITIES INVOLVING SUBURBAN COMMUNITIES

1. On December 22, 1965, we adopted the Policy Statement on Section 307(b) Considerations for Standard Broadcast Facilities Involving Suburban Communities, 2 FCC 2d 190, 6 RR 2d 1901, in which we set forth our new standards for standard broadcast stations that would be located in a suburban community and that would serve adjacent urbanized areas. We stated that every applicant who falls within our test will be required to demonstrate that his proposal is designed to provide a realistic local transmission service for his specified community and that an applicant who fails to make the necessary showing will be treated as one proposing the larger community and be required to meet all of the technical provisions of our rules for stations assigned to that larger community. We also stated that such an applicant, who meets all of those technical requirements, will be permitted to prosecute his proposal as if he were an applicant for that larger community and that he might receive a grant on the condition that the application is amended to specify the larger community as his station location.

2. However, it has recently come to our attention that these provisions are capable of being used by a lone applicant to obtain a grant without complying with all of our regulations and policies governing applications for the larger community. Thus, such an applicant, specifying a suburban station location and complying with the technical requirements for the larger community, could seek a grant as a station for the larger community without showing, before his application is accepted for filing, that he meets all of our allocation requirements, without demonstrating that he has investigated and proposed to meet the needs and interests of the larger community in his programming proposal, and without giving notice of his intention to serve the larger community so that any other interested party would have an opportunity to propose service for the same or a needier community. Such a result was not contemplated when we adopted the 307(b) Policy Statement. There is no reason why such an applicant, who is merely seeking a grant of his application by any means possible, should be considered as proposing the larger community when he has made no attempt to comply with our regulations and policies for stations assigned to that larger community.

3. For these reasons we are convinced that the 307(b) Policy Statement should be clarified to preclude such a lone applicant from obtaining a grant of his application for a station in the larger community without complying with all of our requirements for that community. */ As specified in the clarified language of paragraph 11 of the Policy Statement, when such an applicant seeks a grant for the larger community, he must formally petition to amend his application to specify the larger community as his station location. If the amendment is granted, the application will be removed from hearing, returned to the processing line, assigned a new file number, and required to comply with all of our regulations and policies for that larger community before it can be granted. Accordingly, paragraph 11 of the 307(b) Policy Statement is hereby clarified as follows:

11. If an applicant sustains his burden under the specified issues and rebuts the presumption, he will be treated as an applicant for his specified community and accorded all of the 307(b) considerations which flow therefrom. However, if the applicant fails to rebut the presumption, he will be treated as an applicant for the larger community and required to meet all of the provisions of our Rules, including Sections 73.30, 73.31, and 73.188(b)(1) and (2), for stations assigned to that larger community. 1/ An applicant who meets those requirements will be permitted to prosecute his proposal as if he were an applicant for that larger community. However, he will be accorded only the 307(b) preference to which that larger community is entitled and will be granted only upon the condition that he amend his application to specify the larger community as his station location. Where a lone applicant originally proposes to serve a smaller community and subsequently seeks an authorization for the nearby larger community, he will be required to petition to amend his

1/ When an applicant for community A, who falls within our test of presumed service, set forth in paragraph 8, supra, for larger community B and also for still larger community C, fails to establish that he will realistically serve his specified community A, but demonstrates that he will realistically serve larger community B, he will be required to meet the technical provisions of our Rules and the other requirements of this paragraph only for larger community B, not also for still larger community C.

*/ While we are aware that a similar problem could also arise in a multiple applicant proceeding, we are persuaded that it would be more appropriate to determine the procedure to be followed under such circumstances on the basis of the specific facts which may hereafter be presented to us.

application to specify that larger community. If the amendment is granted, the application will be removed from hearing, returned to the processing line, assigned a new file number, and the applicant will be required to comply with all of the provisions of our regulations and policies for that larger community before his application will be granted. The proposal of an applicant who fails to rebut the presumption and fails to meet all of the technical requirements for that larger community will be denied.

Action by the Commission June 12, 1968. Commissioners Hyde (Chairman), Lee, Cox, Loevinger and Johnson.

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